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Supreme Court of the United States

RICHARD PENDERGRASS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Pendergrass respectfully petitions for a writ of certiorari to the Indiana Supreme Court in *Pendergrass v. State*, No. 71S03-0808-CR-00445.

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a) is published at 913 N.E.2d 703. The opinion of the Indiana Court of Appeals (App. 20a) is published at 889 N.E.2d 861. The relevant trial court proceedings and order (App. 39a) are unpublished.

JURISDICTION

The opinion of the Indiana Supreme Court was entered on September 24, 2009. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

This Court held in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), that the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to "'be confronted with' the analysts at trial." *Id.* at 2532 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). This case raises the question of whether the prosecution complies with that holding by introducing forensic reports through the in-court testimony of someone, such as a supervisor, who did not perform or observe the testing discussed in the reports. In this case, a bare majority of the Indiana Supreme Court upheld the practice, deepening a square conflict of authority on the issue.

1. In May 2003, petitioner Richard Pendergrass took his daughter C.P. to the doctor, where they learned she was pregnant. C.P. later broke the news to her mother, petitioner's ex-wife. Her mother demanded that C.P. reveal the father's name within a week. Near the end of that week, C.P. told her mother that she thought petitioner was the father. She could not recall any instance of petitioner having intercourse with her. But C.P. said that petitioner had inappropriately touched her in the years leading up to the pregnancy. According to C.P., petitioner sometimes gave her "sleeping pills" at night, after which she would wake up to find petitioner on top of her or digitally penetrating her vagina.

C.P.'s mother relayed these accusations to the police, who then began an investigation. Shortly thereafter, C.P. had an abortion. Officer Steven

Metcalf of the St. Joseph County Police Department retrieved a tissue sample collected from the fetus, so that the police could test the tissue.

When the police questioned petitioner about C.P.'s accusations, petitioner denied them. He also voluntarily provided a blood sample to the police. Finally, petitioner played for Officer Metcalf a phone message C.P. had left for him, stating that her accusations were false. After reviewing this evidence, the police took no further action at that time.

Three years later, however, for reasons not apparent from the record, the police resumed their investigation. Officer Kris Hinton contacted C.P. and collected a cheek swab. The police then sent this swab, petitioner's blood sample, and the tissue from the aborted fetus to the Indiana State Police Laboratory in Lowell.

Daun Powers, one of the laboratory's forensic examiners, conducted a DNA analysis on these three specimens. This type of DNA examination involves several stages of analysis. *See generally* Indiana State Police Laboratory Division, Forensic Biology Unit, *DNA Test Methods and Procedures* (rev. 2003); Seattle-Post Intelligencer, *How DNA is Tested in Crime Labs*, July 22, 2004, *available at* http://www.seattlepi.com/dayart/20040722/DNAtesting.pdf. First, an analyst conducts a fourteen-step procedure that isolates and extracts DNA from the tissue samples. Next, the analyst instigates a polymerase chain reaction (PCR) to generate a workable amount of DNA. PCR is a "complex, multi-step technique" which requires laboratory technicians to "exercise great care to avoid contaminating the

samples and committing other mechanical errors." 2 PAUL GIANNELLI & EDWARD IMWINKELRIED, SCIENTIFIC EVIDENCE § 18.04[a], at 48 (4th ed. 2007). During the third stage, an analyst follows a six-step process to separate sixteen specified areas of the DNA molecule onto a grid called an electropherogram, which the analyst then reads and interprets. In interpreting this grid, the analyst must exercise discretion in separating actual DNA peaks from "spurious peaks or technical artifacts," which can lead to erroneous results. Scientific Evidence § 18.04[b].

After purportedly following all of these protocols, Powers prepared a "Certificate of Analysis," a two-page report identifying the evidence received by the lab and summarizing her test results. App. 48a-51a (reproducing report). Powers also created a second report, titled "Profiles for Paternity Analysis," which purports to set forth (for purposes of conducting a comparison) genetic markers of petitioner, C.P., and the fetus. App. 51a. The laboratory supervisor, Lisa Black, reviewed these documents and initialed the former with her employment number ("4774") and the latter with "LB." The police then forwarded the reports to Dr. Michael Conneally, a retired professor at Indiana University, for statistical paternity analysis. Although the record does not expressly say so, Conneally presumably told the police that he thought, based on the information Powers had provided, that petitioner was the father of the child.

2. The State charged petitioner with two counts of sexual molestation. Ind. Code § 35-42-4-3. Petitioner denied the charges and sought to prove

that there were two other possible fathers of C.P.'s child.

The State put C.P. on the stand and then sought to verify her accusations through its DNA evidence. The State, however, did not call Powers to testify at trial, nor did the State ever assert that she was unavailable for any reason. Instead, the prosecution sought to introduce the Certificate of Analysis and the Profiles for Paternity Analysis that Powers had authored, as State Exhibits 1 and 2, through the testimony of Lisa Black. Petitioner argued that this would violate the Confrontation Clause as construed in *Crawford v. Washington*, 541 U.S. 36 (2004), because it would deprive the defense of any "way of challenging th[e] report[s]." App. 44a. More specifically, petitioner argued that forensic laboratory reports were testimonial evidence because they were prepared as part of the police investigations. Therefore, petitioner continued, the prosecution could not introduce the reports without "hav[ing] the person who did the test come in and [be] subject to cross-examination." App. 44a.

Conceding that petitioner may have a "marvelous appellate argument," the trial court overruled his objection. App. 44a. The trial court reasoned that police laboratory reports could not be testimonial because they are business records. App. 45a. Therefore, according to the trial court, "*Crawford* [did not] mean that the person that did the lab report now has to come in." App. 44a.

Over petitioner's continuing objection, Black testified concerning Powers' laboratory reports. Black explained that as the police laboratory's supervisor, she had reviewed and initialed Powers'

work. But Black's testimony concerning the DNA analysis that Powers claimed to have performed, and the conclusions Powers reached, consisted solely of repeating Powers' assertions made in the reports themselves. App. 4a; *see also* App. 18a (Rucker, J., dissenting) ("There is no evidence that Ms. Black did anything more than rubber stamp the results of Ms. Powers' work."). Furthermore, when the defense pressed Black for specifics concerning Powers' testing sequence beyond what was stated in the reports, Black responded: "I don't have any knowledge of that." App. 4a. And when asked to explain why she thought that Powers would not have had two specimens open at once during her work (a practice contrary to standard protocol for DNA analysis), Black responded, "I know because she is an excellent analyst and that's how she would do it." Tr. 154 (Oct. 1, 2007).

The State later put Dr. Conneally on the stand. Dr. Conneally again recited Powers' findings and testified extensively regarding the content of her work product. He claimed that based on the forensic conclusions she had reached, there was a 99.9999% chance that petitioner was the father of the fetus. App. 4a.

In her closing argument, the prosecution acknowledged that its case was "circumstantial" because C.P. could not testify that petitioner had ever had intercourse with her. But the prosecution contended that the DNA evidence it had presented "confirmed" C.P.'s belief that petitioner had committed the crime. Tr. 546 (Oct. 1, 2007). In particular, the prosecution exhorted the jury to focus on Dr. Conneally's testimony and to "look at the lab

report, and the lab report talks about the different items of evidence that were received, the different items that were tested from each person, and the profiles that were generated from those items that were tested . . . ." Tr. 544 (Oct. 1, 2007). Those reports, the prosecution contended, showed beyond a reasonable doubt that petitioner must have impregnated C.P.

The jury convicted petitioner on both counts. The trial court sentenced him to consecutive terms totaling sixty-five years in prison.

3. The Indiana Court of Appeals affirmed. It upheld the trial court's *Crawford* rulings, but on entirely different grounds. The court of appeals reasoned that Powers' forensic reports were admissible despite her not taking the stand because "the Confrontation Clause does not apply to statements admitted for reasons other than proving the truth of the matter asserted." App. 37a (citing *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (in turn citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985))). As the court of appeals put it, the reports "were not admitted to prove that Pendergrass molested C.P.," but "instead they merely provided context for Dr. Conneally's opinion." *Id.*

4. The Indiana Supreme Court granted discretionary review. While the case was pending, this Court issued its decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), clarifying that forensic laboratory reports are testimonial under *Crawford*. Three months later, a bare majority of the Indiana Supreme Court affirmed the court of appeals, adopting yet another rationale to justify admitting Powers' forensic reports without calling her to the

stand. Specifically, the Indiana Supreme Court upheld the admission of Powers' testimonial statements on the ground that "it [is] up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen feature[s] live witnesses." App. 12a (citing *Melendez-Diaz*, 129 S. Ct. at 2532 n.1). The court noted that State introduced two live witnesses: Lisa Black, Powers' supervisor, and Dr. Conneally, the prosecution's genetics expert. In the Indiana Supreme Court's view, this "sufficed for Sixth Amendment purposes." App. 12a-13a.

The dissent accused the majority of basing its reasoning on "certain isolated passages from the *Melendez-Diaz* opinion" that, "taken in context," dictated the opposite result. App. 15a-16a. In the dissent's view, *Melendez Diaz* held that "a defendant has a constitutional right to confront at the very least the analyst that actually conducts the tests." App. 19a. The opportunity to cross-examine a supervisor is "no substitute for a jury's first-hand observations of the analyst that performs a given procedure." App. 19a.

REASONS FOR GRANTING THE WRIT

State high courts and federal courts of appeals are deeply and intractably divided over whether the Confrontation Clause, as explicated in *Crawford v. Washington*, 536 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), allows the government to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst who did not perform or observe the laboratory analysis described in the statements. This Court should use this case to

resolve this escalating conflict. Forensic evidence plays a central role in many criminal prosecutions. Allowing surrogate analyst testimony prevents scrutiny of the actual analyst's "honesty, proficiency, and methodology," *Melendez-Diaz*, 129 S. Ct. at 2538, in the form guaranteed by the Sixth Amendment: live testimony in front of the accused and the trier of fact, with an opportunity for cross-examination. As such, the court's holding below – that the Confrontation Clause was satisfied by allowing the defendant to cross-examine someone other than the author of the reports the prosecution introduced – is incorrect.

I. The Indiana Supreme Court's Decision Deepens The Conflict Over The Question Presented.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the prosecution may not introduce "testimonial" hearsay against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. Five years later, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), this Court clarified that forensic laboratory reports are testimonial evidence. *Id.* at 2532. Accordingly, this Court held that the prosecution violates the Confrontation Clause when it introduces a nontestifying analyst's forensic laboratory report through the testimony of a police officer.

This Court further indicated that two important, but distinct, questions concerning forensic evidence must be resolved to implement *Melendez-Diaz*. The

first is whether a state satisfies the Confrontation Clause if it requires defendants to do more than simply demand that the prosecution put an analyst on the stand in order to introduce the contents of a forensic report. *See Melendez-Diaz,* 129 S. Ct. at 2541 n.12. When this Court decided *Melendez-Diaz,* one case touching on this issue was pending on a petition for a writ of certiorari, *Briscoe v. Virginia*, 657 S.E.2d 113 (Va. 2008), *cert. granted*, 129 S. Ct. 2858. This Court immediately granted the petition and is hearing the case this Term.

The second issue concerns whether the prosecution satisfies the Confrontation Clause whenever it calls *some* forensic analyst to the stand. *See Melendez-Diaz,* 129 S. Ct. at 2532 n.1; *id.* at 2444-46 (Kennedy, J., dissenting). When this Court decided *Melendez-Diaz*, several cases touching on this issue – that is, cases in which the courts found no confrontation violations at least in part because the prosecution had called at least some forensic expert to the stand – were pending on petitions for writs of certiorari. The cases fell into three categories. First, some cases involved scenarios in which the prosecution introduced forensic reports while an analyst was on the stand, but those reports were simply machine print-outs and thus were nontestimonial. *See United States v. Washington*, 498 F.3d 225 (4th Cir. 2007) (Supreme Court docket No. 07-8291); *Blaylock v. Texas*, 259 S.W.3d 202 (Tex. Ct. App. 2008) (No. 08-8259). Second, one case involved a scenario in which a laboratory supervisor testified based in part on someone else's forensic reports, but the supervisor never repeated anything in the reports and the prosecution never introduced them into evidence; instead, the supervisor limited

himself to stating his own conclusions without revealing their underlying basis. *State v. O'Maley*, 932 A.2d 1 (N.H. 2007) (No. 07-7577). Third, some cases involved scenarios in which the prosecution introduced nontestifying analysts' forensic reports through the in-court testimony of a different forensic analyst. *People v. Barba*, 2007 WL 4125230 (Cal. Ct. App. Dec. 21, 2007) (unpublished) (No. 07-11094); *State v. Crager*, 879 N.E. 2d 745 (Ohio 2007) (No. 07-10191).

This Court denied certiorari in the first two categories of cases, leaving in place their holdings that the Confrontation Clause had not been violated.[1] But this Court granted, vacated, and remanded the two cases in the third category – the cases that had held that the prosecution could introduce one forensic analyst's testimonial statements through the in-court testimony of another.[2] A split among state supreme courts and a federal court of appeals has quickly developed concerning this issue, which in fact deepens a preexisting conflict on the question. That is the issue this case presents.

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[1] *See Washington v. United States*, 129 S. Ct. 2856 (2009); *Blaylock v. Texas*, 129 S. Ct. 2861 (2009); *O'Maley v. New Hampshire*, 129 S. Ct. 2856 (2009).

[2] *See Barba v. California*, 129 S. Ct. 2857 (2009); *Crager v. Ohio*, 129 S. Ct. 2856 (2009). This Court denied certiorari in one other case involving this fact pattern: *People v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) (No. 07-7770). However, the California Supreme Court had held that even if a Confrontation Clause violation had occurred, any error was harmless. *Geier*, 161 P.3d. at 140.

1. In the wake of *Melendez-Diaz*, two state supreme courts and one federal court of appeals have held that the Confrontation Clause prohibits what might be called "surrogate" forensic testimony – that is, introducing one forensic analyst's testimonial statement through the in-court testimony of another. In *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009), the defendant argued that the prosecution violated the Confrontation Clause by permitting one forensic analyst "to recite [another's] findings and conclusions on direct examination." *Id.* at 1027. Drawing on its earlier decision in *Commonwealth v. Nardi*, 893 N.E.2d 1221 (Mass. 2008), which had held that a testifying analyst in such a scenario is "plainly . . . asserting the truth of" the nontestifying analyst's findings in a manner that triggers the defendant's constitutional right to confrontation, *id.* at 1232-33, the court held that *Melendez-Diaz* and *Crawford* require a testifying "expert witness's testimony [to be] confined to his or her own opinions." *Avila*, 912 N.E.2d at 1029. When a forensic examiner, "as an expert witness . . . recite[s] or otherwise testif[ies on direct examination] about the underlying factual findings of [an] unavailable [forensic analyst] as contained in [his forensic] report," the prosecution transgresses the Confrontation Clause. *Id.* at 1029.

Similarly, in *State v. Locklear*, 681 S.E.2d 293, 304-305 (N.C. 2009), the prosecution introduced two forensic analysts' reports through the in-court testimony of a third analyst. Reciting *Crawford*'s basic rule that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless *the declarant* is unavailable to testify and the accused has had a prior opportunity to cross-

examine *the declarant*," the North Carolina Supreme Court held that introducing one forensic analyst's report through the live testimony of a different analyst "violate[s a] defendant's constitutional right to confront the witnesses against him." *Id.* at 304-05 (emphasis added); *see also State v. Galindo*, 683 S.E.2d 785 (N.C. Ct. App. 2009) (finding confrontation violation where supervisor testified concerning someone else's forensic analysis).

The Seventh Circuit likewise has held that has held that although a surrogate forensic analyst may testify based on raw data someone else generated, the "conclusions" of the nontestifying analyst who performed the testing are testimonial statements that must be "kept out of evidence." *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.), *cert. denied*, 129 S. Ct. 40 (2008). Reaffirming that ruling in a case after *Melendez-Diaz*, the Seventh Circuit held that a forensic analyst's testimony based on forensic tests that another analyst performed did not violate the Confrontation Clause because "[the second analyst's] report was not admitted into evidence." *United States v. Turner*, ___ F.3d ___, 2010 WL 92489, at *5 (7th Cir. Jan. 12, 2010). The Confrontation Clause would have been violated if the testifying analyst had "not [been] involved in the testing process" at issue and the prosecution had introduced the second analyst's certificate of analysis. *Id.* at *4-*5.

Intermediate courts in three large states – Texas, Michigan, and California – have likewise held that surrogate forensic testimony violates the Confrontation Clause. *See People v. Payne*, 774 N.W.2d 714 (Mich. Ct. App. 2009); *Wood v. State*, ___ S.W.3d ____, 2009 WL 3230848 (Tex. Ct. App. Oct. 7,

2009); *Hamilton v. State*, ___ S.W.3d ____, 2009 WL 2762487 (Tex. Ct. App. Aug. 31, 2009); *Cuadros-Fernandez*, ___ S.W.3d ____, 2009 WL 2647890 (Tex. Ct. App. Aug. 28, 2009); *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People v. Lopez*, 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).[3] Moreover, while the Michigan Supreme Court has not ruled on the issue, it has denied review in a case holding that surrogate forensic testimony violated the Confrontation Clause and has vacated and remanded three decisions that condoned such testimony. *Compare People v. Horton*, 2007 WL 2446482 (Mich. Ct. App. 2007), *rev. denied*, 772

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[3] Two reported California Court of Appeal opinions have reached a contrary result, reasoning that the California Supreme Court's pre-*Melendez-Diaz* decision in *People v. Geier*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), dictates that "contemporaneously created" forensic reports are not testimonial and that surrogate forensic testimony does not violate the Confrontation Clause. *See People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-12 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People v. Gutierrez*, 99 Cal Rptr. 3d 369 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *accord People v. Bingley*, 2009 WL 3595261 (Cal. Ct. App. Nov. 3, 2009). As explained *supra* in footnote 2, however, this Court's denial of certiorari in *Geier* is readily explainable by the California Supreme Court's alternative harmless-error holding. Indeed, the State of California itself conceded in *Dungo* that "the reasoning in *Melendez-Diaz* undermines some of the rationale of *People v. Geier*," and the State withdrew its "argument that the autopsy report [was] not testimonial because it constitutes a 'contemporaneous recordation of observable events.'" 98 Cal. Rptr. 3d at 711 n.11 (quoting state's supplemental letter brief).

N.W.2d 46 (Mich. 2009), *with People v. Raby*, 2009 WL 839109 (Mich. Ct. App. 2009), *vacated and remanded*, 775 N.W.2d 144 (Mich. 2009); *People v. Dendel*, 2008 WL 4180292 (Mich. Ct. App. 2008), *vacated and remanded*, 773 N.W.2d 16 (Mich. 2009); *and People v. Lewis*, 2008 WL 1733718 (Mich. Ct. App. Apr. 15, 2008), *vacated and remanded*, 772 N.W.2d 47 (Mich. 2009). These post-*Melendez-Diaz* orders strongly suggest that the Michigan Supreme Court views the practice of surrogate forensic testimony as untenable.

2. In direct contrast, three state high courts have held, based on the two distinct theories the Indiana appellate courts adopted below, that introducing one forensic analyst's testimonial statement through the in-court testimony of another does not violate the Confrontation Clause.

a. Two state supreme courts have reasoned that surrogate forensic testimony satisfies the Confrontation Clause because it gives defendants the opportunity to cross-examine someone who is generally knowledgeable about the analyses involved, even if not the analyst who authored the forensic reports the prosecution seeks to introduce. In this case, the Indiana Supreme Court followed this theory, reasoning that "the [*Melendez-Diaz*] majority insisted that it would be up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen featured live witnesses." App. 12a (citing *Melendez-Diaz*, 129 S. Ct. at 2532 n.1). At least when the live witness the prosecution chooses is familiar with the laboratory as well as with the analyst who authored the report at issue, this, in the Indiana Supreme Court's view,

"suffice[s] for Sixth Amendment purposes." App. 10a-11a, 13a.

The Georgia Supreme Court has also adopted the "good enough to suffice" rationale. *See Rector v. State*, 681 S.E.2d 157 (Ga. 2009). So long as a forensic analyst whom the prosecution puts on the stand has "reviewed the data and testing procedures to determine the accuracy" of another analyst's report, the testifying analyst may tell the jury the absent analyst's conclusions and say that he endorses them. *Id.* at 160.

b. The Illinois Supreme Court – like the Indiana Court of Appeals in this case, *see* App. 37a-38a – has held that forensic analysts, as expert witnesses, can repeat testimonial statements of nontestifying analysts on the theory that such statements, even when the sole basis for the experts' opinions, are not offered for the truth of the matter asserted. *People v. Lovejoy*, ___ N.E.2d ____, 2009 WL 3063366 (Ill. Sept. 24, 2009). In *Lovejoy*, a medical examiner testified that another toxicologist detected six different types of drugs in the victim's body after conducting blood tests, indicating that poisoning caused the victim's death. *Id.* at *21-*23. Relying on footnote nine in *Crawford*, which reaffirmed that the Confrontation Clause is not implicated when out-of-court statements are introduced for reasons other than establishing the truth of the matter asserted, the Illinois Supreme Court held that the medical examiner's testimony repeating the nontestifying analyst's conclusions was not admitted for its truth but rather was introduced "to show the jury the steps [the examiner] took prior to rendering an expert

opinion in th[e] case." *Id.* at *22-*23 (citing *Crawford*, 541 U.S. at 59 n.9).[4]

3. The post-*Melendez-Diaz* conflict concerning surrogate forensic testimony deepens a pre-existing split over whether, as a more general matter, testimonial statements of a nontestifying witness can be introduced through the in-court testimony of an expert witness.

The Second Circuit, three state supreme courts, and the District of Columbia's highest court have held that introducing the testimonial statements of a nontestifying witness through the in-court testimony of an expert witness violates the Confrontation Clause. *See United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008) (admission of testimonial statements through the in-court testimony of a gang expert); *Roberts v. United States*, 916 A.2d 922 (D.C. 2007) (admission of forensic laboratory reports through DNA expert's testimony); *State v. Johnson*, 982 So. 2d 672 (Fla. 2008) (admission of lab report through supervisor's testimony); *State v. Mangos*, 957 A.2d 89

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[4] Footnote nine in *Crawford* referenced *Tennessee v. Street*, 471 U.S. 409 (1985), reaffirming that the Confrontation Clause is not implicated when the prosecution offers hearsay (even testimonial hearsay) for a purpose other than establishing the truth of the matter asserted. In *Street*, the defendant argued that his confession was false because the police had simply given him the confession of his alleged accomplice and told him to repeat it. *Id.* at 411-12. The prosecution countered by introducing the nontestifying accomplice's confession to show that it differed in material ways from the defendant's. Because the accomplice's confession was not offered for its truth, this did not violate the Confrontation Clause. *Id.* at 417.

(Me. 2008) (admission of statements concerning creation of DNA swabs through supervisor); *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005) (admission of testimonial statements through psychologist's testimony), *cert. denied*, 547 U.S. 1159 (2006).[5]

In contrast, in *State v. Tucker*, 160 P.3d 177 (Ariz. 2007), *cert. denied*, 552 U.S. 923 (2007) a prosecutorial expert witness (a "materials expert") repeated statements on the stand that another, nontestifying expert had told him in an investigatory interview.[6] The Arizona Supreme Court did not dispute that the nontestifying expert's statements were testimonial. But the court refused to find a *Crawford* violation, reasoning that "a testifying expert witness may, for the limited purpose of showing the basis of his or her opinion, reveal the substance of a non-testifying expert's statements." *Id.* at 193. "Such statements do not violate the Confrontation Clause," the court continued, "because they are not admissible for their truth." *Id.*

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[5] The Fourth Circuit, in an opinion by Judge Wilkinson, recently agreed with the Second Circuit's *Mejia* decision, explaining that "[a]llowing a [prosecution] witness simply to parrot out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion would provide an end run around *Crawford*." *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). But the Fourth Circuit held that the Confrontation Clause was not violated in the case it was considering because the expert did not repeat or refer to any testimonial statements to the jury.

[6] The petition for certiorari in this case did not raise this Confrontation Clause issue.

The Arizona Court of Appeals has applied *Tucker* following *Melendez-Diaz* to hold that the prosecution may present an expert forensic analyst to testify concerning the results of tests performed by others. *State v. Gomez*, 2009 WL 3526649, at *4-5 (Ariz. Ct. App. Oct. 29, 2009).

4. Although *Melendez-Diaz* is a recent decision, this conflict over surrogate testimony is now firmly entrenched and ripe for resolution. The split among state high courts and the federal courts of appeals now stands at eight-to-four. Five of those decisions post-date *Melendez-Diaz*, and they are divided three-to-two. There is no prospect that this split will resolve itself, nor any reason to believe that further percolation or anything this Court says in its forthcoming *Briscoe* decision will reveal any new arguments or considerations relevant to the dispute.[7]

II. This Issue Is Important To The Proper Administration Of Criminal Trials.

This Court should not allow the conflict over surrogate witnesses to persist.

1. The question presented implicates practices in several states across the country. Crime laboratory analyses play a central evidentiary role in a large number of criminal trials, and prosecutors in numerous jurisdictions rely on surrogate witnesses to present the analysis of nontestifying analysts. Prosecutors, defense lawyers, and judges need to

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[7] Of course, if this Court, out of an abundance of caution, wishes to hold this case pending the outcome in *Briscoe*, petitioner would have not objection to that.

know as soon as possible whether surrogate testimony satisfies the Confrontation Clause.

2. The question presented also directly implicates the truth-seeking function of trial. As this Court noted in *Melendez-Diaz*, forensic reports, just like other *ex parte* testimony created by law enforcement agents, presents "risks of manipulation." 129 S. Ct. at 2536. Indeed, investigative boards, journalists, and interest groups have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories. *Id.* at 2536-38.[8] This Court also has recognized that "a forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz*, 129 S. Ct. at 2536. Even an entirely honest and objective forensic analyst may suffer from a "lack of proper training or deficiency in judgment," *id.* at 2537, or may place undue analytical weight on a suspect methodology, *id.* at 2538.

Surrogate witnesses fail to address – and may actually aggravate – the problems posed by an analyst's potential fraud, incompetence, or flawed methodology. A recent case from California vividly illustrates the point. In *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal.

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[8] For the most recent such example, see Jeremy W. Peters, *Report Condemns Police Lab Oversight*, N.Y. Times, Dec. 18, 2009 (describing "pervasively shoddy forensics work," as well as routinely "falsified test results," over a fifteen year period in the New York State crime laboratory).

Dec. 2, 2009) the prosecution introduced an autopsy report to prove that a certain amount of time had elapsed before the victim's death, a hotly contested issue at trial. The medical examiner who had authored the report, however, had since been fired. He had also been forced to resign "under a cloud" from another job, and was blacklisted by law enforcement in two more counties for falsifying his credentials. *Id.* at 704. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995); Scott Smith, *S.J. Pathologist Under Fire Over Questionable Past,* THE RECORD, Jan. 7, 2007, *available at* http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/A_NEWS/701070311#STS=g329z7h5.134t.

In light of this problematic track record, the prosecution put the medical examiner's supervisor on the stand instead of the examiner. As the supervisor explained during the preliminary hearing, "[t]he only reason they won't use [the examiner himself] is because the law requires the District Attorney to provide this background information to each defense attorney for each case, and [the prosecutors] feel it becomes too awkward to make them easily try their cases." *Dungo*, 98 Cal. Rptr. 3d at 708 (alterations in original). The California Court of Appeal held that this surrogate testimony violated *Crawford*, observing that the "prosecution's intent" had been to "prevent[] the defense from exploring the possibility that the [medical examiner] lacked proper training or had poor judgment or from testing [his] 'honesty, proficiency, and methodology.'" *Id.* at 714 (quoting *Melendez-Diaz*, 129 S. Ct. at 2538).

Under the Indiana Supreme Court's holding in this case, however, the prosecution would have been permitted to hamstring the defense in this manner. Even in cases seemingly involving less dramatic facts, allowing surrogate testimony would effectively insulate forensic analysts' work from scrutiny. In the field of ballistics and toolmark analysis, even good faith forensic conclusions "involve subjective qualitative judgments by examiners, and [] the accuracy of the examiners' assessments is highly dependent on their skill and training." *United States v. Taylor*, ___ F. Supp. 2d ___, 2009 WL 3347485, at *7 (D.N.M. Oct. 9, 2009) (quoting Committee on Identifying the Needs of the Forensic Sciences Community; Committee on Applied and Theoretical Statistics, National Research Council, *Strengthening Forensic Sciences in the United States: A Path Forward*, 5-20 (2009). Yet there is little hope for defense counsel to find out through questioning supervisors which ballistics and toolmark reports are faulty; only questioning the analysts who authored incriminating reports can reveal whether the analysts actually understand the science at issue and whether they exercised appropriate care and followed necessary protocols in reaching their conclusions.

III. This Case Is An Excellent Vehicle For Considering The Question Presented.

This case presents an excellent vehicle for resolving the split of authority over the question presented.

1. This case raises the question presented free from any waiver or collateral review complications. It comes to this Court on direct review, and petitioner

clearly and unambiguously objected at trial, arguing that the introduction of the forensic reports through the testimony of a witness other than the one who authored them violated the Confrontation Clause. App. 2a-3a; App. 41a-45a. Petitioner also preserved this issue by contending at each level of the Indiana appellate courts that the admission of the analyst's reports violated the Sixth Amendment. *See* Petr. Ind. C.A. Br. at 8-11; Petr. Ind. Sup. Ct. Br. at 3. Finally, the Indiana courts resolved this issue on the merits. App. 13a-14a.

2. This case clearly and cleanly presents the question of whether the prosecution may introduce one forensic analyst's testimonial statements through the testimony of a different forensic analyst. The forensic reports at issue are unquestionably testimonial under *Melendez-Diaz*, and the statements in the reports were unquestionably relayed to the jury. In fact, the prosecution introduced the reports directly into evidence. Moreover, the shortcomings of using a surrogate witness were perfectly encompassed in the supervisor's assertion that she "kn[e]w" the analyst had followed standard procedures "because she is an excellent analyst and that's how she would do it." Tr. 154 (Oct. 1, 2007).

3. Finally, the forensic reports at issue played a central role at trial. Acknowledging the "circumstantial" nature of its case, the prosecution told the jury that the DNA reports "confirmed" the victim's testimony. *Id.* at 544. Indeed, the prosecution urged jurors to "look at" the nontestifying analysts' lab reports, emphasizing that "the lab report talks about the different items of evidence that

were received, the different items that were tested from each person, and the profiles that were generated from those items that were tested." *Id.* If this Court concludes that petitioner's confrontation rights were violated, he would be entitled to a new trial.[9]

IV. The Indiana Supreme Court's Decision Is Incorrect.

1. The Indiana Supreme Court erred in holding that the government may introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst. The Sixth Amendment guarantees a defendant the right "to be confronted with *the* witnesses against him." U.S. Const. amend VI

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[9] Concurring in the judgment of the court of appeals, one judge expressed his belief that C.P.'s testimony "would, on its own, have been sufficient to support [petitioner's] conviction." App. 39a (Baker, C.J., concurring in the judgment). Even accepting this assessment as true, an assessment of "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of" cannot establish harmless error. *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963); *see also United States v. Lane*, 474 U.S. 438, 450 n.13 (1986) ("[T]he harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.") (internal quotation marks and citation omitted). Rather, "the government must demonstrate beyond a reasonable doubt that the tainted evidence did not contribute to the conviction." *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008); *accord Fields v. United States*, 952 A.2d 859, 867-68 (D.C. 2008); *see generally Chapman v. California*, 386 U.S. 18 (1967). The government cannot do that when, as here, its own closing argument stressed the importance of the evidence.

(emphasis added). The use of the definite article in this constitutional provision is not adventitious. Instead, it dictates that if the State decides to introduce testimonial evidence, it must afford the defendant the opportunity be confronted with the specific creator of that evidence – that is, the person who actually made the statement or authored the document at issue. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Accordingly, this Court has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police officer. *See id.*; *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz*, 129 S. Ct. at 2532; *id.* at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . . .").

Nothing about the status of an in-court witness as a forensic supervisor or similar type of person alters this analysis. It is true that a supervisor may be a "competent witness" to answer general questions regarding someone else's forensic declarations, such as "systemic problems with the laboratory processes" that the person used. App. 11a. But the Confrontation Clause guarantees more than that. As this Court explained in *Melendez-Diaz*, the Clause guarantees an opportunity to test the "honesty, proficiency, and methodology" of the actual author of a forensic report that the prosecution seeks to introduce into evidence. 129 S. Ct. at 2538. Indeed, an analyst "who provides false results may, under oath in open court, reconsider his false testimony.

And, of course, the prospect of confrontation will deter fraudulent analysis" and "weed out . . . incompetent [analysts] as well." *Id.* at 2537 (citations omitted).

The holding of *Melendez-Diaz*, in fact, effectively resolves the question presented here. There, this Court explained that "[a] witness's testimony against a defendant is . . . inadmissible unless *the witness* appears at trial or, if *the witness* is unavailable, the defendant had a prior opportunity for cross-examination." 129 S. Ct. at 2531 (emphasis added); *see also id.* at 2532 ("petitioner was entitled to 'be confronted with' *the analysts* at trial") (emphasis added); *id.* at 2537 n.6 ("The analysts who swore the affidavits provided testimony against Melendez-Diaz, and *they* are therefore subject to confrontation . . . .") (emphasis added). The inescapable implication of this holding – as even the dissent acknowledged – is that the analyst who wrote "those statements that are actually introduced into evidence" must testify at trial. 129 S. Ct. at 2545 (Kennedy, J., dissenting). Surrogate forensic testimony does not satisfy the Confrontation Clause.

2. Neither of the rationales that courts have offered for avoiding this straightforward conclusion withstands scrutiny.

a. The Indiana Supreme Court concluded that surrogate forensic testimony "suffice[s] for Sixth Amendment purposes" based on a footnote in *Melendez-Diaz* concerning how the Confrontation Clause regulates prosecutorial attempts to prove a chain of custody. Quoting this Court's statement that its ruling "does not mean that everyone who laid hands on the evidence must be called," 129 S. Ct. at

2532 n.1, the Indiana Supreme Court asserted that "the majority [of this Court] insisted that it would be up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen featured live witnesses." App. 12a.

This Court did not suggest, much less insist upon, any such thing. The full quote from the footnote at issue was as follows:

> While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," *post,* at 2546, this does not mean that everyone who laid hands on the evidence must be called. . . . It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.

Melendez-Diaz, 129 S. Ct. at 2532 n.1. The import of the full passage is unambiguous: prosecutorial discretion with respect to proving some fact lies in choosing whose testimonial statements to present, not in deciding whom to put on the stand for purposes of admitting a particular testimonial statement. Once the prosecution has decided to introduce a particular person's testimonial statements (whether it is in the form of a forensic report or anything else), the prosecution must present the person who made those statements to testify live in court.

At bottom, the Indiana Supreme Court's reasoning – like the Massachusetts courts' reasoning

in *Melendez-Diaz* itself – "is little more than an invitation to return to [this Court's] overruled decision in [*Ohio v. Roberts*, 448 U.S. 56 (1980)]." *Melendez-Diaz,* 129 S. Ct. at 2536. The Indiana Supreme Court asserted: "If the chief mechanism for ensuring reliability of evidence is to be cross-examination, Pendergrass had that benefit here." App. 11a. But *Crawford* does not simply require an opportunity for cross-examination of *someone* who can discuss, or even vouch for, the reliability of the testimonial evidence introduced. It requires the prosecution to make the declarant of testimonial evidence available for cross-examination, so the defendant can probe the reliability of the declarant's statements directly. *Crawford,* 541 U.S. at 61. Hence, as a leading treatise explains, "*Crawford*'s language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial." D.H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE-EXPERT EVIDENCE § 3.10.3, at 57 (Supp. 2009).

b. The "not for the truth" rationale that the Indiana Court of Appeals advanced here, and that other courts have relied upon, fares no better.

> To use [testimonial] information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; conversely, if the jury doubts the accuracy or validity of the basis evidence, that presumably increases

> skepticism about the expert's conclusions.

THE NEW WIGMORE, *supra*, § 3.10.8, at 53. Thus, as courts and commentators have recognized, it is simply "nonsense" to claim that a forensic report introduced to provide a basis for some other analyst's in-court testimony is not introduced for the truth of the matter asserted. *Id.* at 54; *see also People v. Goldstein*, 6 N.Y.3d 119, 128 (N.Y. 2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context."); Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 828, 855-56 (2008) ("[I]t is not logically possible for a jury to use the hearsay statements to assess the weight of the expert's opinion other than by considering their truth").

This case illustrates the point. It strains all sense of reason to suggest that the DNA reports that Powers authored were not introduced for their truth. Almost all of Black's direct examination was focused on establishing the credibility of Powers' work, and when Conneally testified that there was a 99.9999% chance that the petitioner was the father, his estimate was based exclusively on the testimonial evidence provided by Powers. If the jury could not accept Powers' reports as true and correct, it would have had no way to credit Black's testimony or Conneally's statistical conclusions. That is why the prosecutor specifically told the jury in her closing argument, to "look at the lab report, and the lab report talks about the different items of evidence that were received, the different items that were tested

from each person, and the profiles that were generated from those items that were tested . . . ." Tr. 544.

To be sure, modern rules of evidence generally allow expert witnesses to offer opinions based on information of the type that is customarily relied upon by other experts in the field, regardless of whether that information is independently admissible. *See, e.g.*, Fed. R. Evid. 703. But it is now well established that the Confrontation Clause does not depend on "the vagaries of the rules of evidence." *Crawford,* 541 U.S. at 61. Thus, in a criminal case "[w]here testimonial hearsay is involved, the Confrontation Clause trumps [expert] rules of evidence." *People v. Dungo,* 98 Cal. Rptr. 3d at 713 n.14. Such is the case here.

The "not for truth" justification for surrogate testimony, in short, is "an effort to make an end run around a constitutional prohibition by sleight of hand." Jennifer Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & POL'Y 791, 822 (2007). This Court should not allow it to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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January 19, 2010

APPENDIX

APPENDIX A

Supreme Court of Indiana.

Richard PENDERGRASS, Appellant
(Defendant below),
v.
STATE of Indiana, Appellee
(Plaintiff below)

No. 71S03-0808-CR-00445
Sept. 24, 2009

On Petition to Transfer from the
Indiana Court of Appeals,

No. 71A03-0712-CR-00588.

SHEPARD, Chief Justice.

Richard Pendergrass was convicted of two counts of child molesting based in part on DNA evidence showing he was very likely the father of the victim's aborted fetus. The State's witnesses to this effect were a laboratory supervisor with direct knowledge of the processing of the samples and an expert DNA analyst who used the laboratory's print-outs to render an opinion. Pendergrass contends his rights under the Confrontation Clause were violated because the State did not present the technician who ran the samples through the laboratory's equipment. We conclude that the proof submitted was consistent with the Sixth Amendment as recently detailed in *Melendez-Diaz v. Massachusetts*.

Facts and Procedural History

This case commenced when the State charged Richard Pendergrass with two counts of child molesting, class A felonies. Ind. Code § 35-42-4-3 (2007).

At trial, C.D., Pendergrass's daughter, testified that he had started touching her inappropriately when she was eleven years old. At age thirteen, when she began to feel ill, Pendergrass took her to the doctor, who told them she was pregnant. C.D. told her mother of her pregnancy and its cause, and C.D.'s mother then reported Pendergrass to the police. Soon after, C.D. had an abortion.

Two witnesses testified at trial concerning DNA evidence demonstrating the likelihood that Pendergrass was the father of the fetus. Lisa Black, a supervisor at the Indiana State Police Laboratory, explained the process of test sampling for DNA. (Tr. at 120-97.) Dr. Michael Conneally, a DNA expert who performed the paternity analysis, explained how he came to his conclusions regarding the likelihood that Pendergrass was the father of the aborted fetus. (Tr. at 209-52.) During the testimony given by Black and Conneally, the State presented three documents, two prepared by the Indiana State Police Laboratory in Lowell, Indiana, and one prepared by Conneally. Pendergrass objected to admitting these documents, insisting on Confrontation Clause and hearsay grounds that the State must call the analyst who performed the test in the laboratory. Over

Pendergrass's objection the court admitted these documents into evidence.

Exhibit 1 was labeled "Certificate of Analysis," prepared by Daun Powers, a forensic DNA analyst at the Lowell laboratory, and admitted during Black's testimony. This document consisted of an inventory of physical evidence submitted to the lab, a list of the tests performed, and indications of where the evidence and the test results were sent. It did not contain any test results or conclusions. (App. at 6-7.)

Exhibit 2, also admitted while Black was on the stand, was a table of the test results titled "Profiles for Paternity Analysis" and compiled by Powers. (App. at 8; Tr. at 176.) This table did not contain conclusions about paternity, just numbers in columns categorized by abbreviated test labels for each of the three test subjects: Pendergrass, C.D., and the aborted fetus. (App. at 8.)

Black had reviewed Exhibit 2 in the original course of the State Police Laboratory's work. (Tr. at 179-80.) In Black's role as supervisor she performs technical, administrative, and random reviews of the work of DNA analysts at the Lowell and Ft. Wayne laboratories. All DNA case work is reviewed by a second qualified analyst. Black performs some of these technical reviews and all of the other reviews. She performed the technical review of Powers's tests on the evidence at issue in this case. (Tr. at 126-27, 131, 179-81.) Her initials appear next to each of the three samples on the DNA profile, indicating she "confirmed that this paperwork that Ms. Powers was providing to

Dr. Conneally was an accurate representation of her results." (App. at 8, Tr. at 179-80.) On the stand Black described the steps Powers took to develop the DNA profiles for each of the three samples. (Tr. at 127.) She described what types of samples were taken from the three subjects based on Powers's notes. (Tr. at 140-42.)

Black testified about the general procedures followed at the laboratory, including receiving, storing, and testing evidence. (Tr. at 126-30, 138-40, 153-55.) Throughout Black's testimony, it was plain enough that Powers had performed the original laboratory processing and that Black had supervised and checked her work. (Tr. at 120-97.) For example, when asked which test was performed first, Black replied, "I don't have any knowledge of that." (Tr. at 153.) She sometimes relied on Powers's notes for her testimony about the specific tests performed. (Tr. at 140-42.) For example, when asked if anything indicated a difficulty in creating the DNA profile, Black looked to Powers's notes, which were not admitted into evidence. (Tr. at 140-42.) She had not reviewed most of Powers's notes for trial. (Tr. at 145-46.)

During Conneally's testimony the court admitted Exhibit 3, a paternity index table that Conneally created. (Tr. at 217, 222.) Conneally used the index to calculate the probability that Pendergrass was the father of the fetus based on the laboratory's test results. (Tr. at 214, 216, 222.) Given the paternity index results, there was a 99.9999 percent likelihood that Pendergrass was the father of the fetus that C.D. aborted, or, in other words, Pendergrass was 2.8

million times more likely to be the father than a random man. (Tr. at 215-26.)

The jury returned guilty verdicts on both counts. The trial court sentenced Pendergrass to consecutive terms of 40 years on Count I and 25 years on Count II. (App. at 3.) The Court of Appeals affirmed. *Pendergrass v. State,* 889 N.E. 2d 861 (Ind. Ct. App. 2008). We granted transfer. 898 N.E. 2d 1219 (Ind. 2008) (table).

I. Pendergrass Was Not Denied His Right of Confrontation.

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004).

Crawford overturned the rule announced in *Ohio v. Roberts,* 448 U.S. 56, 72 (1980), which permitted hearsay statements as long as they bore what the *Roberts* opinion described as the "indicia of reliability." *Crawford,* 541 U.S. at 68. *Crawford* dispensed with this substantive understanding of the Confrontation Clause in favor of a procedural one, stating,

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination . . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

541 U.S. at 61-62.

In determining the types of evidence to which the Confrontation Clause applies, *Crawford* turned to definitions of language from the text itself: "It applies to 'witnesses' against the accused-in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford,* 541 U.S. at 51, (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)).

"Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford,* 541 U.S. at 68-69. While the *Crawford* court intentionally refrained from defining what evidence is "testimonial," it listed three "formulations of this core class of 'testimonial' statements":

> (1) *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
>
> (2) extrajudicial statements . . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;
>
> (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51-52 (numbers added).

Crawford emphasized that the Sixth Amendment's very essence is to protect against abuses of government officials. "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse — a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Crawford,* 541 U.S. at 56 n. 7. The opinion later claimed that the "Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Crawford,* 541 U.S. at 66.

Therefore, says *Crawford*, the text, taken with traditional exceptions, means that the Sixth Amendment does not permit the admission of "testimonial" statements of a witness who does not appear at trial unless he or she is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford,* 541 U.S. at 53-54.

Since *Crawford*, the Supreme Court has clarified incrementally the definition of "testimonial." It first excluded from "testimonial" statements whose primary purpose is to enable police assistance but not statements made to police during an investigation. *Davis v. Washington*, 547 U.S. 813 (2006). *Davis* that the testimonial statements are those that are substitutes for live testimony, that is "they do precisely *what a witness does* on direct examination . . . ." *Davis,* 547 U.S. at 830. Because "[n]o 'witness' goes into court to proclaim an emergency and seek help," statements seeking help during an emergency do not classify as "testimonial." *Davis,* 547 U.S. at 828. By contrast, in the companion case to *Davis, Hammon v. Indiana*,[1] where the prosecution sought to enter an affidavit by the alleged victim based on conversations with the police in their investigation, the Confrontation Clause barred admission because the officer was seeking to find out "what happened," not "what is happening." *Davis,* 547 U.S. at 830.

The more recent and most relevant for our purposes is *Melendez-Diaz v. Massachusetts,* __U.S.__, 129 S. Ct. 2527 (2009), in which the defendant was convicted for drug crimes based partly on certificates

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[1] Decided here as *Hammon v. State*, 821 N.E.2d 444 (Ind. 2005).

of analysis stating the substance found in seized bags was cocaine of a certain weight, admitted without any live testimony either by the analyst who signed the affidavits or by anyone else. The state processes contemplated that the affidavits were to stand on their own, so no witnesses were called. *Melendez-Diaz*, 129 S. Ct. at 2531. After concluding that the certificates were "quite plainly affidavits," the Supreme Court held that the affidavits clearly fell within "testimonial" evidence because they "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'" the analysts swearing their accuracy were "witnesses" for Sixth Amendment purposes, and the defendant was entitled to "be confronted with" the analysts at trial, absent a showing that the analysts were unavailable to testify and the defendant had a prior opportunity to cross-examine them. *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Davis v. Washington*, 547 U.S. at 830 (2006)).

Concluding that the certificates were the functional equivalent of live, in-court testimony, the Court pointed out that the affidavits were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 52). Indeed, the sole purpose of the certificates was to provide "*prima facie* evidence of the composition, quality, and the net weight" of the substance. *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting Mass. Gen. Laws, ch. 111, § 13). This purpose was reprinted on the certificates themselves. *Melendez-Diaz*, 129 S. Ct. at 2531.

The court characterized its opinion as a "rather straightforward application of our holding in *Crawford*." *Melendez-Diaz,* 129 S. Ct. at 2533. As such, we take *Melendez-Diaz* as another clarifying step, in the vein of *Davis*, in defining the boundaries of the term "testimonial." Following *Melendez-Diaz* we will therefore treat the Certificate of Analysis in the present case as testimonial, as it fits the definition of testimony as clarified by *Melendez-Diaz.*

It is not clear whether more than one analyst signed each certificate in *Melendez-Diaz* or three different analysts signed each one. We similarly do not know whether the majority insisted that all the analysts involved in the testing should have testified at trial or if fewer than all of them would be permissible. For instance, if the tests were done jointly, it is not clear whether one who participated in the testing would be sufficient. The court gave some clue on such matters from the majority's declaration that its conclusion "does not mean that everyone who laid hands on the evidence must be called," and that the Confrontation Clause leaves discretion with the prosecution on which evidence to present. *Melendez-Diaz,* 129 S. Ct. at 2532 n.1. That is precisely what the prosecution did in the case before us. It chose to call the laboratory supervisor rather than the laboratory processor. The laboratory supervisor who took the stand did have a direct part in the process by personally checking Powers's test results. (Tr. at 179-80; App. at 8.) As such, she could testify as to the accuracy of the tests as well as standard operating

procedure of the laboratory and whether Powers diverged from these procedures.

The prosecution further chose to call an expert to interpret the test results for the jury. Thus, Pendergrass had the opportunity to confront at trial two witnesses who were directly involved in the substantive analysis, unlike Melendez-Diaz, who confronted none at all.

If the chief mechanism for ensuring reliability of evidence is to be cross-examination, Pendergrass had that benefit here. If there were systemic problems with the laboratory processes, Black would be a competent witness, perhaps the ideal witness, against whom to lodge such challenges. Moreover, Black had personal knowledge of the laboratory's work on the specimens at issue as the person who performed the technical review. The State's view is that such an examination of processes is precisely what occurred: "Indeed, Pendergrass effectively cross-examined Black on every step of the evidence testing process, from receipt of the samples from police, through storage, extraction, and comparison." (Appellee's Br. at 13.) After Black left the stand, of course, the State called the expert who actually gave the opinion that the DNA of Pendergrass, C.D., and the fetus matched.

While the prosecution presented its two witnesses, Pendergrass challenges that it did not call the right — or enough — witnesses. The justices of the Supreme Court wrestled some on this question in *Melendez-Diaz*, although the certificates in that case were not accompanied with any live testimony. 129 S. Ct. at

2531, 2532 n.1, 2546 (Kennedy, J., dissenting). The dissent raised the specter of requiring "in-court testimony from each human link in the chain of custody." *Melendez-Diaz,* 129 S. Ct. at 2546 (Kennedy, J., dissenting). The majority rejected this characterization of its ruling by stating that it "does not mean that everyone who laid hands on the evidence must be called." *Melendez-Diaz,* 129 S. Ct. at 2532 n. 1.

The *Melendez-Diaz* majority described the affidavits in that case as including only a "bare-bones statement" that the substance was found to be cocaine and emphasized that the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." *Melendez-Diaz,* 129 S. Ct. at 2537. We note that here Pendergrass complains of no such ignorance by the time of trial. In fact, his counsel was thoroughly prepared when the State sought to admit the Certificate of Analysis. (Tr. at 132-37.)

Responding to the dissenters' contention that the decision in *Melendez-Diaz* would require platoons of live witnesses to testify about everything down to and including chain of custody for tested samples, the majority insisted that it would be up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen featured live witnesses. *Melendez-Diaz,* 129 S. Ct. at 2532 n.1. Here, the prosecution supplied a supervisor with direct involvement in the laboratory's technical processes

and the expert who concluded that those processes demonstrated Pendergrass was the father of the aborted fetus. We conclude this sufficed for Sixth Amendment purposes.

II. Should the Exhibits Have Been Excluded as Hearsay?

Pendergrass argues that the trial court improperly admitted the State's exhibits 1-3 as hearsay, and the parties exchange arguments about various subsections of Indiana Evidence Rule 803.

One general rule about opinions by qualified experts is that they may rely on information supplied by other persons who have supplied material which the expert regards as material, even if the supplier is not present to testify in court. Ind. Evidence Rule 703; *Ealy v. State,* 685 N.E. 2d 1047, 1056 (Ind. 1997) (trial court did not err by admitting expert testimony based on a properly admitted autopsy report, even if the report had been inadmissible). Medical experts who render an opinion about an individual's mental state on the basis of multiple sources detailing treatment and observation are such an instance. *See, e.g., In re A.J.,* 877 N.E.2d 805, 814 (Ind. Ct. App. 2007) (trial court did not err by admitting expert's testimony as to his treatment recommendations, which were based in part on polygraph results).

The sources upon which Conneally relied might have been subject to a limiting instruction about the purposes for which they were being tendered, but it was not error to admit them.

III. Conclusion

We affirm the trial court.

DICKSON and SULLIVAN, JJ., concur.

RUCKER, J., dissenting.

Before *Crawford v. Washington,* 541 U.S. 36 (2004) as applied in the recent United States Supreme Court decision of *Melendez-Diaz v. Massachusetts,* 557 U.S. ___, 129 S. Ct. 2527 (2009), I would have agreed with the majority that a defendant's opportunity to cross-examine "a supervisor with direct involvement in the laboratory's technical processes . . . ." was sufficient to satisfy the demands of the Sixth Amendment. Op. at ___. Indeed this jurisdiction has historically admitted documents and testimony containing laboratory results from witnesses other than the experts who actually performed the tests or analyses. *See, e.g., Ealy v. State,* 685 N.E.2d 1047, 1055 (Ind. 1997) (holding that an autopsy report was properly admitted under the public records exception to the hearsay rule); *Thompson v. State,* 386 N.E.2d 682, 684 (1979) (holding that an autopsy report was properly admitted under the business records exception to the hearsay rule although the doctor who prepared the report did not sponsor the report at trial and reasoning that the business records exception "does not mean that a sponsor of an exhibit must have personally made it, filed it, or have had first-hand knowledge of the transaction represented by it."); *Fowler v. Napier,* 663 N.E. 2d 1197, 1200 (Ind. Ct. App.1996) (holding that

DNA test results prepared by one doctor and presented at trial by another were properly admitted under the business records exception to the hearsay rule). However, *Melendez-Diaz* seems to point in a different direction thus casting considerable doubt on the continued validity of the foregoing authority.

To be sure *Melendez-Diaz* is not as clear as it could have been in identifying *who* must testify at trial. As the majority correctly observes, "[t]he justices of the Supreme Court wrestled some on this question. . . ." Op. at ___. But to support its contention that the prosecutor may introduce into evidence documents prepared by the actual analyst, through a supervisor, the majority relies on certain isolated passages from the *Melendez-Diaz* opinion. For example the majority points to comments that not "everyone who laid hands on the evidence must be called" and that "the Confrontation Clause leaves discretion with the prosecution on which evidence to present." Op. at ___ (citing *Melendez-Diaz,* 129 S. Ct. at 2532 n.1). However, these comments were directed at a very narrow proposition concerning chain of custody and not the broader proposition the majority here advances.[2] Indeed immediately preceding the footnoted

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[2] The full quote follows:

> Contrary to the dissent's suggestion . . . we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," . . . this does not mean that everyone who laid

comment on which the majority relies, the Court was unequivocal: "Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." *Id.* at 2532 (emphasis in original) (quoting *Crawford,* 541 U.S. at 54).

Also, contrasting the facts in *Melendez-Diaz* to the facts here, the majority notes that the Court described the affidavits in that case as a "bare-bones statement" and that the defendant in that case "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." Op. at ___ (quoting *Melendez-Diaz,* 129 S. Ct. at 2537). Again, however, these comments must be taken in context. The Court itself described them as "illustrative" of its main point which was "[l]ike expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 2537. As the Court also observed,

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> hands on the evidence must be called. As stated in the dissent's own quotation, . . . "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

Melendez-Diaz, 129 S. Ct. at 2532 n.1 (internal citations omitted) (alteration and emphasis in original).

"Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.*

The record is clear that it was Ms. Powers who examined an aborted fetus specimen and buccal swabs taken from C.D., and blood samples apparently taken from defendant Richard Pendergrass, Tr. at 138-42. It was Ms. Powers who conducted a "PCR or polymerase chain reaction" test, Tr. at 124, and ultimately created DNA profiles that were then forwarded to Dr. Conneally of the Indiana University Medical Center for paternity analysis. Tr. at 127, 142. Although the State Police laboratory is qualified to create a DNA profile, it apparently is not qualified to conduct a paternity analysis. Tr. at 127. In any event the "Certificate of Analysis" — a two-page document identifying the evidence received by the laboratory and a summary of the test results — prepared by Ms. Powers and a document entitled "Profiles for Paternity Analysis" — a one-page document detailing the test results-also prepared by Ms. Powers, were admitted into evidence through the testimony of Ms. Powers' supervisor, Ms. Black. It was on the basis of the Profiles for Paternity Analysis that Dr. Conneally reached his conclusion that Pendergrass was the father of the aborted fetus. But, Ms. Powers was never subjected to the rigors of cross-examination on either the examination she performed, the testing she conducted, or the results she reached.

The record shows that Ms. Black testified at length about DNA evidence generally and the specific procedures her office used to map DNA. As to her role,

Ms. Black testified, "As the supervisor obviously I supervise nine people. I review their work. I make the case assignments. I make sure the quality control of the entire unit is what it's supposed to be." Tr. at 121. She further testified:

> I do regular reviews of their case work. I do some technical — all DNA case work has to be reviewed by another qualified analyst which is a technical review. I do some of those. I also do some administrative reviews which means then after it's been technically reviewed they are administratively reviewed. I also do quarterly. I do just the regular — randomly pull cases out and review again for the quality of the work. And I can do all of those on any particular case of my choice.

Tr. at 122. Ms. Black testified that she recalled the particular case of Richard Pendergrass, that she reviewed the testing in that case, and that she indicated that review by writing her four digit number on the bottom. Tr. at 126-27, 131. Specifically she said, "Those are my initials that I confirmed that this paperwork that Ms. Powers was providing to Dr. Conneally was an accurate representation of her results." Tr. at 179.

There is no evidence Ms. Black did anything more than rubber stamp the results of Ms. Powers' work. And the question thus presented is whether those results are in fact accurate. Ms. Black did not testify that she observed Ms. Powers perform any examination of the laboratory specimens or conduct any tests.

Obviously Ms. Black could not testify whether Ms. Powers diverged from standard laboratory procedures or how carefully or competently she performed the specific analyses. Although a supervisor might be able to testify to her charge's general competence or honesty, this is no substitute for a jury's first-hand observations of the analyst that performs a given procedure; and a supervisor's initials are no substitute for an analyst's opportunity to carefully consider, under oath, the veracity of her results. "Confrontation is one means of assuring accurate forensic analysis." *Melendez-Diaz,* 129 S. Ct. at 2536.

In sum, despite whatever ambiguity *Melendez-Diaz* may have created on the question of *who* must testify at trial, it appears to me the opinion is clear enough that a defendant has a constitutional right to confront at the very least the analyst that actually conducts the tests. "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.* at 2531 (citing *Crawford*, 541 U.S. at 54). Because Ms. Powers did not appear at trial, and because there was no evidence of her unavailability or a prior opportunity for Pendergrass to cross-examine her, the trial court erred by admitting into evidence Ms. Powers' testimony by way of the Certificate of Analysis and Profiles for Paternity Analysis. I therefore respectfully dissent on this issue.

BOEHM, J., concurs.

APPENDIX B

Court of Appeals of Indiana

Richard PENDERGRASS, Appellant-Defendant,
v.
STATE of Indiana, Appellee-Plaintiff.

No. 71A03-0712-CR-588

July 8, 2008.

OPINION

RILEY, Judge.

STATEMENT OF THE CASE

Appellant-Defendant, Richard Pendergrass (Pendergrass), appeals his conviction for two Counts of child molesting, Class A felonies, Ind. Code § 35-42-4-3.

Affirmed.

ISSUES

Pendergrass raises two issues on appeal, which we restate as follows:

> (1) Whether the trial court abused its discretion by admitting several exhibits and related testimony concerning deoxyribonucleic acid (DNA) test results without the testimony of the

laboratory technician who performed the actual testing; and

(2) Whether Pendergrass' confrontational rights pursuant to the Sixth Amendment of the United States Constitution were violated when he was denied the opportunity to confront and cross-examine the laboratory technician who performed the DNA analysis.

FACTS AND PROCEDURAL HISTORY

C.P., born on June 8, 1989, is the daughter of D.W. (Mother) and Pendergrass. C.P.'s parents divorced when she was approximately one and one half years old. Originally, C.P. and her siblings lived with their Mother; however, when C.P. was eleven years of age, the children moved in with Pendergrass and his extended family in a residence located in South Bend, Indiana. Pendergrass, C.P., and her younger sister, J.P., shared a downstairs bedroom. Pendergrass slept in a bed, while the girls slept on blankets on the floor.

C.P. was eleven years old when Pendergrass started to touch her inappropriately. The first time it happened, C.P. was asleep and Pendergrass touched her vagina while she was clothed. She woke up and told him to stop. Pendergrass complied. After that time, Pendergrass gave C.P. pills every night which C.P. believed to be sleeping pills. According to C.P.'s sister, the drugs Pendergrass gave to C.P. were red pills that left C.P. acting "dumb, like dumbfounded" or "slow" mentally. (Transcript p. 277). Pendergrass also gave J.P. cold medicine, such as Nyquil. Even though

the pills Pendergrass gave her would usually make her "black out," at times, she would wake up. (Tr. p. 76). C.P. remembered Pendergrass sitting next to her on the floor and touching her vagina under her clothes, sometimes inserting his fingers into her vagina. Whenever he put his fingers inside of her vagina, it made her feel "dirty." (Tr. p. 73-74). On several occasions, he would also kiss her by putting his tongue in her mouth. There were times that C.P. woke up in Pendergrass' bed, with her clothes off and Pendergrass on top of her. Although C.P. had no recollection of feeling anything, afterwards, she would notice an abnormal discharge in her underwear.

When she was thirteen, C.P. began feeling ill and Pendergrass took her to see a doctor. Given her symptoms, the doctor asked C.P. for a urine sample. Following the results of the urine sample, the doctor informed C.P. and Pendergrass that she was pregnant. On Mother's Day, May 11, 2003, C.P. informed her Mother that she was pregnant and that Pendergrass was the father of her unborn child. Mother notified the St. Joseph County Police Department, specifically speaking to Detective Steven Metcalf (Detective Metcalf).

As a result of the police report, Metcalf investigated Pendergrass. In June of 2003, C.P., accompanied by her Mother, had an abortion. Following C.P.'s abortion, Detective Metcalf took possession of the fetus for DNA testing. He also collected a buccal swab from C.P. and a blood sample from Pendergrass for DNA testing. All the evidence was tagged and properly stored in the freezer located

at the St. Joseph County Police Post. Although Detective Metcalf "firmly believed that [he] had sent these items to the [Indiana State Police Laboratory]," he never actually did so. (Tr. p. 308). It was not until May of 2006 that Detective Metcalf discovered his omission and the evidence was sent to the Indiana State Police Laboratory for DNA testing. After testing, it was determined that given the paternity index results, there was a 99.9999 percent likelihood that Pendergrass was the father of the fetus aborted by C.P.

On June 11, 2006, the State filed an Information, charging Pendergrass with two Counts of child molesting, Class A felonies, Ind. Code § 35-42-4-3. On October 1, 2007, a jury trial commenced. During the trial, the trial court admitted, over the objection of defense counsel, three exhibits concerning the DNA testing and testimony related thereto. Four days later, on October 5, 2007, the jury found Pendergrass guilty as charged. On November 1, 2007, at the sentencing hearing, the trial court sentenced Pendergrass to forty years incarceration on Count I and twenty-five years incarceration on Count II, with sentences to run consecutively.

Pendergrass now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of Evidence*

Initially, Pendergrass contends that the trial court abused its discretion when it admitted, over his objection, the test results from the DNA analysis performed by the Indiana State Police Laboratory and testimony related thereto. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Sullivan Builders & Design, Inc. v. Home Lumber of New Haven, Inc.*, 834 N.E.2d 129, 133 (Ind. Ct. App.2005), *reh'g denied, trans. denied.* An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* Moreover we will not reverse the trial court's admission of evidence absent a showing of prejudice. *Id.*

Specifically, Pendergrass contests the admission of three particular exhibits, *i.e.*, State's Exhibits 1, 2, and 3. State's Exhibit 1 is a Certificate of Analysis, prepared by forensic biologist, Daun C. Powers (Powers), employed by the Indiana State Police Laboratory. The Exhibit reflects the results of Powers' DNA extraction from a tissue sample from the arm of the fetus, the buccal swab taken from C.P., and Pendergrass' blood sample. State's Exhibit 2, also prepared by Powers, contains the development of Pendergrass', C.P.'s, and the fetus' "Profiles for Paternity Analysis." (Appellant's App. p. 2). The Exhibit provides the information necessary to establish paternity between the individuals, if any. This information was subsequently submitted to Dr.

Michael Conneally, M.D. (Dr. Conneally), a retired professor of human genetics, human genetic disorders and DNA at Indiana University Medical Center in Indianapolis. State's Exhibit 3 is the Paternity Index, as prepared by Dr. Conneally, which establishes a 99.9999% probability of Pendergrass being the fetus' biological father.

Pendergrass' overarching claim with regard to all three exhibits focuses on the purported hearsay statements contained within each document. With respect to Exhibits 1 and 2, which were admitted at trial through the testimony of Lisa Black (Black), Powers' supervisor at the Indiana State Police Laboratory, Pendergrass asserts that the documents include hearsay statements and thus can only be admitted if the documents fall within one of the recognized hearsay exceptions. In this light, Pendergrass disputes the Exhibits' admissibility based on Indiana Evidence Rule 803(8)(a through d) which prohibits the introduction of investigative reports by police and other law enforcement personnel. With regard to the admission of State's Exhibit 3, which was introduced through Dr. Conneally's testimony, Pendergrass objects that the document was based almost completely on the "impermissible hearsay findings of [Powers]." (Appellant's Br. p. 5). On the other hand, the State asserts that all three Exhibits were properly admitted under the business record exception to the hearsay rules. *See* Ind. Evid. Rule 803(6).

As the use of DNA analysis has become prevalent in criminal cases, it came as a surprise to this court

that after a thorough review of the case law, no precedent exists establishing how documents explaining the underlying analysis of DNA testing may be admitted at a criminal trial. We will discuss the admissibility of each Exhibit in turn.

A. *State's Exhibit 1*

As mentioned before, State's Exhibit 1 is a Certificate of Analysis which compiled the results of Powers' DNA extraction from a tissue sample from the arm of the aborted fetus, from C.P.'s buccal swab, and from Pendergrass' blood sample. Pendergrass contests this admission, arguing that the document was inadmissible under each of the four exceptions of Evid. R. 803(8).

Indiana Evidence Rule 803(8) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> (8) Public Records and Reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to a duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not

> within this exception to the hearsay rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

Pendergrass asserts that Exhibit 1 is either an investigative report excluded by subsections (a) and (b) or a factual finding excluded by subsections (c) and (d). The State, on the other hand, claims that Exhibit 1 was properly admitted pursuant to Evid R. 803(6), records of regularly conducted business activity.

The words "DNA test results" are not magic words which, once uttered, cause the doors of admissibility to open. Although Indiana Code § 35-37-4-13(b)[1] makes

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[1] Indiana Code § 35-37-4-13 provides:

> "Forensic DNA analysis" defined; admissibility
>
> (a) As used in this section, "forensic DNA analysis" means an identification process in which the unique genetic code of an individual that is carried by the individual's deoxyribonucleic acid (DNA) is compared to genetic codes carried in DNA found in bodily substance samples obtained by a law enforcement agency in the exercise of the law enforcement agency's investigative function.
>
> (b) In a criminal trial or hearing, the results of forensic

DNA evidence per se admissible without an inquiry into whether the evidence is scientifically reliable in a particular case, the statutory language merely establishes the reliability of the evidence and the party introducing the evidence will still need to comply with the customary rules of evidence.

Here, State's Exhibit 1 was compiled by Powers and admitted at trial through the testimony of Black, Powers' supervisor at the Indiana State Police Laboratory. Black testified that she supervises nine employees, reviews the testing process, and oversees the general quality control of the work performed at the laboratory. She provides both the technical and administrative review of the DNA testing done by the laboratory. Black clarified the general DNA testing procedures to the jury and stated that she specifically reviewed Powers' testing of the DNA samples taken from C.P.'s fetus, C.P., and Pendergrass.

In *Jenkins v. State,* 627 N.E.2d 789 (Ind. 1993), *reh'g denied, cert. denied,* 513 U.S. 812 (1994), our supreme court was asked to decide whether a technician's laboratory notes concerning DNA testing fall within the business record exception to the hearsay rule where the trial court admitted the documents through the technician's supervisor's testimony. *Id.* at 794. For purposes of its analysis, the *Jenkins'* court assumed "for the sake of argument that

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DNA analysis are admissible in evidence without an antecedent expert testimony that forensic DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material.

the laboratory notes do not fall under the business record exception." *Id.* Instead of investigating the admissibility of the technician's notes, the supreme court focused on the expert who based his opinion on the contested notes and stated that "[a]n expert is allowed to base an opinion on facts or data that are not admissible in evidence if they are of the type reasonably relied upon by experts in the field." *Id.* Thus, the court concluded that as these laboratory notes are used by every supervisor involved in DNA testing, admission is harmless because of use by the expert witness. *Id.*

While we agree with the ultimate result reached in *Jenkins* — admissibility of the documents — we will address the issue disregarded by the *Jenkins'* court, *i.e.,* whether documents created by a laboratory technician at the Indiana State Police Laboratory concerning DNA analysis are admissible under the exceptions to the hearsay rules. However, unlike *Jenkins,* we do not believe the business record exception pursuant to Evid. R. 803(6)[2] comes into play.

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[2] Indiana Evidence Rule 803(6) provides as follows:

> Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in

It does not appear to us that the Indiana State Police Laboratory depends on State's Exhibit 1, the Certificate of Analysis, to operate its business. Rather, the report is compiled for the sole benefit of the State to pursue an action against Pendergrass. Unlike financial statements, inventory records, or other administrative or operational documents traditionally allowed under the business records exception, State's Exhibit 1 appears to be a substantive end product of a service offered by the Indiana State Police Laboratory to a government agency and which becomes the permanent property of that agency. *See, e.g., In re Termination of Parent-Child Relationship of E.T.*, 808 N.E.2d 639, 645 (Ind. 2004) (report compiled by social services agency describing home visits and supervised visits are not admissible under the business records exception to the hearsay rule as this report was a service offered by the social services agency and the report would become the permanent property of an external government agency). As such, State's Exhibit 1 cannot be characterized as a record "kept in the course of a regularly conducted business activity." *See* Evid. R. 803(6).

At first glance, State's Exhibit 1 appears to fall squarely within the first part of the public records exception as stipulated by Evid. R. 803(8). A Certificate of Analysis prepared by an employee of the Indiana State Police Laboratory is clearly a report of a public agency setting forth factual findings resulting

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this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

from an investigation made pursuant to authority granted by law. *See* I.C. § 10-13-6-6(2). However, Evid. R. 803(8) continues and excludes some statements from its exception to the hearsay rule. Pendergrass now maintains that the trial court should have found State's Exhibit 1 inadmissible as it is excluded under all four exceptions to the public records rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

Our supreme court analyzed the "factual findings offered by the government in criminal cases" exclusion in depth in *Ealy v. State,* 685 N.E. 2d 1047 (Ind. 1997) and crafted a three-step test for determining the admissibility of hearsay under that subpart. The *Ealy* test has since been extended to all of the exclusions listed in Evid. R. 803(8). *See Shepherd v. State,* 690 N.E. 2d 318, 326 n.2 (Ind. Ct. App. 1997), *trans. denied; Bailey v. State,* 806 N.E. 2d 329, 333-34 (Ind. Ct. App. 2004), *trans. denied.*

Application of the *Ealy* test mandates that a court first determine whether the report or record contains findings that address a materially contested issue in the case. *Ealy,* 685 N.E. 2d at 1054. If the inquiry in the first step is answered in the negative, the analysis

ends there and the record or report is not rendered inadmissible on hearsay grounds. *Id.* Otherwise, the court must proceed to the second step, which requires the court to determine if the record or report contains factual findings. *Id.* Factual findings are conclusions drawn by an investigator from the facts. *Id.* at 1051. This would be in contrast to "simple listings, or a simple recordation of numbers and the like." *Id.* at 1054. If the record or report does contain factual findings, then the court must move on to step three and determine whether the report was prepared for advocacy purposes or in anticipation of litigation. *Id.* If the report or record was prepared for advocacy purposes or in anticipation of litigation, then it is inadmissible hearsay. *Id.* Even if the trial court determines that the record or report clears that final hurdle, the record or report may be inadmissible if it is not relevant or if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Evid. R. 402 and 403.

Applying the first *Ealy* step to the facts of this case, we conclude that the Certificate of Analysis does not relate to a materially contested issue before the trial court. State's Exhibit 1 is a compilation of data derived from the DNA analysis of the fetus, C.P., and Pendergrass. This mere compilation is not contested by Pendergrass. As the inquiry into the first step is answered in the negative, State's Exhibit 1 is not inadmissible on hearsay grounds. However, even proceeding to the second step, we find that State's Exhibit 1 does not contain factual findings as defined by *Ealy*. Rather, Powers detailed in State's Exhibit 1

the evidence received from the St. Joseph County Police Department for further analysis and recorded the results of the DNA analysis on the fetus, C.P.'s buccal swab, and Pendergrass' blood as observed by her. As such, the contested exhibit is a recording of physical conditions as they were observed by Powers akin to a simple recordation of numbers and therefore admissible under the *Ealy* test. Consequently, we conclude that the trial court did not abuse its decision by admitting State's Exhibit 1. *See Sullivan Builders & Design, Inc.*, 834 N.E. 2d at 133.

B. *State's Exhibit 2*

State's Exhibit 2, also prepared by Powers and admitted at trial through Black's testimony, contains the development of Pendergrass', C.P.'s, and the fetus' "Profiles for Paternity Analysis." (Appellant's App. p. 8). The Exhibit specifies sixteen markers present in an individual's DNA sample as a numerical value. Here, too, Pendergrass contests the admission of the document asserting it falls within one of the exceptions of the public records rule of Evid. R. 803(8).

As with State's Exhibit 1, State's Exhibit 2 was properly admitted at trial. Application of the *Ealy* test indicates first that the Profiles for Paternity Analysis does not relate to a materially contested issue before the trial court. State's Exhibit 2 is a numerical, uncontested compilation of data derived from the DNA analysis of the fetus, C.P., and Pendergrass. As the first inquiry into the first step is answered in the negative, State's Exhibit 2 is not inadmissible on hearsay grounds. However, even applying the second

step, we find that State's Exhibit 2 does not contain factual findings as defined by *Ealy*. Rather, in State's Exhibit 2, Powers assigns numerical values to the sixteen markers found in the DNA samples of the fetus,. C.P., and Pendergrass. She does not interpret the values, reach a conclusion or infer anything from the enumeration. As such, the contested Exhibit is, like State's Exhibit 1, a mere recording of physical conditions as they were observed by Powers and therefore admissible under the *Ealy* test. Consequently, we conclude that the trial court did not abuse its discretion by admitting State's Exhibit 2. *See Sullivan Builders & Design, Inc.*, 834 N.E. 2d at 133.

C. *State's Exhibit 3*

State's Exhibit 3 represents the Paternity Index, as prepared by Dr. Conneally, which establishes a 99.9999 percent probability of Pendergrass being the fetus' biological father. This document was admitted at trial through the testimony of its author, Dr. Conneally. His testimony clarified that although he authored the Paternity Index and calculated the probability score, this result was entirely based upon his interpretation of the numerical values contained in State's Exhibit 2, the Profiles for Paternity Analysis. Pendergrass disputes the admissibility of Exhibit 3, claiming that the "State may not use an expert as a conduit to introduce the hearsay statements of another witness that it has failed to produce." (Appellant's Br. p. 7).

Initially, we note that State's Exhibits 1 and 2 were properly admitted as exceptions to the hearsay

rule pursuant to Evid. R. 803(8). These exhibits had been admitted prior to Dr. Conneally taking the stand. Accordingly, Dr. Conneally did not introduce hearsay statements when discussing his expert opinion concerning Pendergrass' probability of being the fetus' biological father.

Furthermore, with regard to expert testimony, Indiana's Rule of Evidence 703 specifies:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible hearsay, provided that it is of the type reasonably relied upon by experts in the field.

Here, it is not only statutorily enacted in I.C. § 35-37-4-13 that "forensic DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material," but Dr. Conneally also testified that the only method of calculating paternity is by reliance and reference to State's Exhibits 1 and 2. He clarified that this method is universally used within the scientific community. Accordingly, we conclude that State's Exhibit 3 was properly admitted at trial.

II. *Confrontation Rights*

Lastly, Pendergrass contends that the trial court erred by admitting evidence in violation of his Sixth Amendment right to confront and cross examine

witnesses pursuant to *Crawford v. Washington,* 541 U.S. 36 (2004). In particular, he maintains that as State's Exhibits 1 and 2 are testimonial in nature, the documents should have been introduced through Powers' trial testimony, unless the State had established that she was unavailable to testify and Pendergrass had a prior opportunity for cross-examination.

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him." In *Crawford,* the United States Supreme Court determined that the Confrontation Clause bars "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. In essence, *Crawford* drew a line between testimonial and non-testimonial hearsay without providing a definition of testimonial evidence,[3] granting the State latitude for developing their hearsay laws in relation to non-testimonial hearsay. *See Richardson v. State,* 856 N.E. 2d 1222, 1230 (Ind. Ct. App. 2006), *trans. denied.* However, the Supreme Court did comment on existing hearsay exceptions, stating "[m]ost hearsay exceptions covered statements that by their nature were not testimonial — for

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[3] We note that *Crawford* has been expanded upon and clarified by *Hammon v. State,* which was decided together with *Davis v. Washington,* 547 U.S. 813 (2006), but do not believe those decisions affect our result in the instant case.

example, business records or statements in furtherance of a conspiracy." *Crawford,* 541 U.S. at 56.

Even without deciding whether the public records exception of Evid. R. 803(8) is one of the existing hearsay exceptions that covers non-testimonial statements, we find that State's Exhibits 1 and 2 are not subject to the strictures of *Crawford.* It is well established that the Confrontation Clause does not apply to statements admitted for reasons other than proving the truth of the matter asserted. *Id.* at 59 n. 9 (citing *Tennessee v. Street,* 471 U.S. 409, 414 (1985)). Here, State's Exhibits 1 and 2 were not admitted to prove that Pendergrass molested C.P., instead they merely provided context for Dr. Conneally's opinion. Both documents clarify the procedures and basis for the parental probability percentage as calculated by Dr. Conneally. In sum, we conclude that the admission of State's Exhibits 1 and 2 did not implicate Pendergrass' right to confront the witnesses against him.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly admitted State's Exhibits 1, 2, and 3 and related testimony concerning DNA analysis and the subsequent test result without the testimony of the laboratory technician who performed the actual testing; and Pendergrass' confrontational rights pursuant to the Sixth Amendment of the United States Constitution were not implicated when he was denied the opportunity to confront and cross-examine

the laboratory technician who performed the DNA analysis.

Affirmed.

ROBB, J., concurs.

BAKER, C.J., concurs in result with separate opinion.

BAKER, Chief Judge, concurring in result.

I concur in the result reached by the majority and in the analysis it applied to reach that result. I write separately to add that Pendergrass raises no challenge to C.P.'s testimony. Therefore, even if the exhibits at issue had been admitted erroneously, I believe that the error would have been harmless because C.P.'s testimony that Pendergrass molested her would, on its own, have been sufficient to support Pendergrass's conviction.

APPENDIX C

IN THE ST. JOSEPH SUPERIOR COURT
SOUTH BEND, INDIANA

STATE OF INDIANA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CAUSE NO. 71D03-0607-FA-0034
	)	
RICHARD PENDERGRASS,	)	
	)	
Defendant	)	

TRANSCRIPT OF PROCEEDINGS

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* * * *

[*130]

STATE'S WITNESS—LISA BLACK (DIRECT)

* * * *

Q. (By Ms. Hurley) Ms. Black, I'm going to show you what's been marked as State's Exhibit 1 for identification purposes. Can you identify that document, please?

A. Yes. This is the Certificate of Analysis that was prepared by Daun Powers on her results.

[*131]

Q. Okay. And was that — you said that you were the supervisor involved in this case; is that correct?

A. That is correct.

Q. And is that document prepared at or near the time Daun is conducting the analysis?

A. Yes, it was.

Q. And reviewed then by you as the supervisor?

A. Yes. And that's indicated down at the bottom. It says reviewed by and it has my number 4774 which is my public employee number which indicates that I did review it.

Q. Okay. And is this —

THE COURT: Is that a way to identify you?

THE WITNESS: Yes.

THE COURT: Okay. What's the thing called?

THE WITNESS: Public employee.

THE COURT: No, no, not that, this sheet.
THE WITNESS: Certificate of Analysis.

Q. (By Ms. Hurley) And is that document made or kept in the ordinary course of lab business?

A. I'm sorry?

Q. I'm sorry. Is that document made or kept in the ordinary course of the lab's business?

A. Yes. [*132]

MS. HURLEY: Okay. Your Honor, I'd offer into evidence State's Exhibit 1.

MR. LUBER: I have a question on voir dire if I might?

THE COURT: Sure.

MS. LUBER: Ms. Black, the agency that you are employed for in this laboratory is a branch of the Indiana State Police; is that correct?

THE WITNESS: That is correct.

MR. LUBER: We have an objection

THE COURT: Okay. We have to come over here.

(The following side bar conference was held out of the hearing of the jury.)

MS. HURLEY: I didn't even hear the question.

THE COURT: He said the agency — or the agency that you are employed by is a branch of the Indiana State Police. I think that's what he said. Is that what you said?

MR. LUBER: Yes. We have an objection to the introduction of this document because it's hearsay.

THE COURT: And that's why? Why is it [*133] hearsay?

MR. LUBER: It's being offered for the truth of the contents of it, and it's hearsay. My client has had no opportunity to cross-examine the document.

THE COURT: Well, I thought she was going for the business exemption.

MR. LUBER: Well, I would say it might be a business exception except following within this exception investigative reports by police and other law enforcement personnel except when offered by an accused. It's the Indiana State Police Laboratory.

THE COURT: I don't think it's an investigative report. It's a lab report.

MS. HURLEY: And in the case of *Fowler v. Napier*, which I have, from I believe 1996, the Court ruled that DNA reports are business records. In a paternity case it should be no different —

MR. LUBER: A paternity case is not a criminal case in which *Crawford* has said in Indiana cases has said since the defendant has this right to confront the accuser. And we have no way of cross-examination.

[*134]

THE COURT: Let me see *Fowler*. Let me see it. It's *Fowler*, F-o-w-l-e-r, v. N-a-p-i-e-r. And the cite for that is 663 N.E. 2d 1197, Court of Appeals from 1996.
And do you have *Crawford*?

MR. LUBER: Yes.

THE COURT: What does *Crawford* say?

MR. LUBER: Well, *Crawford* is the Supreme Court case that basically said that the right of confrontation does stand. It actually overruled *Ohio v. Roberts* which basically said records and other kinds of things can come in because it —

MS. HURLEY: I believe, Your Honor —

THE COURT: Time out. We're talking about investigative reports. Was it a DNA case?

MR. LUBER: It was not DNA. It was reports taken from a witness who —

THE COURT: Got you. Got you. I understand. I still would like *Crawford*. But this is a question of

a lab test by the Indiana State Police, and I don't understand *Crawford* to have said you can never again have Indiana State Police DNA evidence.

MR. LUBER: It doesn't say that and they [*135] can do it if they have the person who did the test came in and was subject to cross-examination. We have no way of challenging that report.

THE COURT: You may have a marvelous appellate—if they come in against you, you may have a marvelous appellate argument. I don't think so because I think the DNA testing under the Indiana State Police doesn't bring—even though it is a criminal investigation it does not mean—I do not understand *Crawford* to mean that the person that did the lab report now has to come in.

MR. LUBER: The only case that I'm aware of recently—and unfortunately I didn't bring the citation—was an Oregon case that I think allowed the kind of stuff, and in its procedure said the DNA reports come in and that the defendant can force them to produce the thing so they can cross-examine. And they said that was too much of a burden upon the defendant, that simply that record was not going to come in here, and it's not the kind of thing that comes in—

THE COURT: You mean Oregon kept it out?

[*136]

MR. LUBER: Oregon said no, we can't do that. It doesn't meet the standards of *Crawford v. Washington*—

THE COURT: So Oregon keep [sic] it out?

MR. LUBER: Yes.

THE COURT: You may bring it into Indiana to keep it out in Indiana, but Oregon doesn't control Indiana. I'm going to let it in. I agree it's an issue, but my ruling is that the business exception has been met. I understand you to be saying that it still isn't enough to get it in because of confrontation.

MR. LUBER: Right. I made the same argument before Judge Chamblee in another case, and he ruled against me. It was all set up to go, but the guy got found not guilty so—

THE COURT: So there you go. Well, you may have it anyway. But you made the same argument. He made the same ruling. If the business exception comes in, it's in. And it's not the confrontation question I gather.

MR. LUBER: Yes.

THE COURT: Got it. That's what I'm doing, too. Whatever he said I say. Although it's hearsay if he says it.

[*137]

MR. LUBER: The business record might do it in the regular commercial business but this is—but they are doing tests and things. It is no different than if the local police department did a fingerprint analysis and the local police department did a gun residue test or any of these other kind [sic] of stuff. That's part of their investigation of the crime.

The Indiana State Police is simply a branch of law enforcement who is carrying it out. They dress it up with laboratory, but they are an investigative arm of the State.

THE COURT: You may get a ruling that completely cuts all investigative procedures for fingerprints, DNA, and everything else—

MR. LUBER: Because in those situations the examiner is the one who comes in and testifies not the paper.

THE COURT: Well, she's riding on being right. We'll see.

(Side bar concluded.)

THE COURT: There was an objection. We've had our discussion about the objection. For the reasons I have stated at our little side bar, I am overruling the objection.

[*138]

So you move to admit State's Exhibit 1. I am admitting it over objection, and that's a continuing objection through the discussion of the exhibit.

Q (By Ms. Hurley) Lisa, can you describe how—when you received in this case the fetus, how would you prepare a DNA profile from such evidence?

A. In a case of product of conception in this case, you will get actual tissue parts of the fetus. In this case Ms. Powers described it as it appeared to be like an arm from the fetus. She takes a tissue sample from that and then proceeds as I described. She takes a portion of it into a tube and extracts the DNA and proceeds.

Q. And you received a blood sample from Richard Pendergrass. How is the profile developed with a blood sample?

* * * *

APPENDIX D

[1]

CERTIFICATE OF ANALYSIS
Indiana State Police

State Police Laboratory
1550 East 181st Avenue
Lowell, IN 46356

Telephone: (219) 696-1835

EVIDENCE
RELEASED TO:
Printed Name:
Billy D. [illegible]
Signature: /s/
Date: 6-23-06
10:55 AM

June 2, 2006

TO: KRIS G. HINTON
FAMILY VIOLENCE AND
SPECIAL VICTIMS UNIT
912 EAST LASALLE AVE
SUITE 200
SOUTH BEND IN 46617

STATE'S
EXHIBIT
1

Lab File #: 06L-827

Agency Case #: 03-3001

Evidence Submitted By: Inv. Kris G. Hinton

Received by Laboratory 05/12/06 at 09:00

Item 1 Indiana State Police Evidence Collection Kit containing blood sample taken from suspect Richard A. Pendergrass sealed and marked SM 198.

Item 1A1 Sealed manila envelope containing a stain card prepared from the purple top tube of

	whole blood from Richard A. Pendergrass contained in item 1.
Item 2	Aborted fetus specimen taken from the victim Cassie R. Pendergrass sealed in a specimen bottle and marked KGH #2043, sealed in a manila evidence envelope.
Item 2A	Sealed manila envelope containing a sample of the fetal tissue contained in item 2.
Item 3	Buccal swab taken from the victim Cassie R. Pendergrass sealed in an evidence envelope marked KGH #2043.
Item 3A	Sealed manila envelope containing the buccal swab from Cassie R. Pendergrass retained from item 3.

RESULTS:

In the DNA analysis detailed below, the following loci were analyzed using Polymerase Chain Reaction (PCR): FGA, TPOX, D8S1179, vWA, Penta E, D18S51, D21S11, TH01, D3S1358, Penta D, CSF1PO, D16S539, D7S820, D13S317, D5S818 and Amelogenin.

A stain card (item 1A1) was prepared from the whole blood standard of Richard A. Pendergrass contained in item 1.

DNA profiles were determined for Richard A. Pendergrass (item 1A1), Cassie R. Pendergrass (item 3A, retained from item 30, and the fetal tissue (item 2A, retained from item 2). This information was forwarded to Dr. Michael Conneally of the Indiana University Medical Center for paternity analysis.

Lab File # 06L-827

[handwritten:] DP
Reviewed by 4774

[2]

All subitems created from originally submitted items will be retained by the Indiana State Police Laboratory for the possibility of future analysis.

/s/
Daun C. Powers
[handwritten:]#6497, 6/18/06
Forensic Biologist

DCP
Lab File # 06L-827

Reviewed by 4774

	D13	D5	Amelogenin
Richard A. Pendergrass	9,11	12,12	XY [initials: LB]
Fetus	11,12	12,13	XY [initials: LB]
Cassie R. Pendergrass	9,12	12,13	XX [initials: LB]

Supreme Court, U.S.
MAY 10 2010
OFFICE OF THE CLERK

101

(3)

No. 09-866

IN THE

Supreme Court of the United States

RICHARD PENDERGRASS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Indiana

BRIEF IN OPPOSITION TO THE PETITION

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HEATHER L. HAGAN
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Deputy Attorneys General

Counsel for Respondent

QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce DNA profiles created by polymerase chain reaction and vertical gel electrophoresis, as recorded by a non-testifying lab analyst and a computer, through the testimony of the analyst's supervisor and a forensic DNA expert.

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STATEMENT OF THE CASE

Petitioner Richard Pendergrass stands convicted of two counts of molesting his teenage daughter, both class A felonies. Pet. App. at 2a, 5a; *see also* Ind. Code § 35-42-4-3. At trial, Pendergrass's daughter, C.D., testified that Pendergrass had been touching her inappropriately since she was eleven years old. Pet. App. at 2a. At the age of thirteen, C.D. discovered that she was pregnant and she believed Pendergrass to be the father of her child. *Id.* Soon after learning that she was pregnant, C.D. had an abortion. *Id.*

Two witnesses testified at trial concerning DNA evidence demonstrating the likelihood that Pendergrass was the father of the aborted fetus. Lisa Black, a supervisor at the Indiana State Police Laboratory in Lowell, Indiana, explained the process of creating DNA profiles for Richard Pendergrass, C.D., and the aborted fetus. Dr. Michael Conneally, a DNA expert who performed the paternity analysis, explained how he came to his conclusions regarding the likelihood that Pendergrass was the father of his daughter's aborted fetus. *Id.*

During the testimony of Black and Conneally, the State introduced three documents, two of which were prepared by the Indiana State Police Laboratory and the third of which was prepared by Conneally. *Id.* Pendergrass objected to the admission of all three documents on Confrontation Clause and hearsay grounds, arguing that the State must call the analyst who performed the test in the laboratory.

Id. The trial court admitted these documents over Pendergrass's objection. *Id.* at 2a-3a.

The first document, Exhibit 1, labeled "Certificate of Analysis", was prepared by Daun Powers, a forensic lab analyst for the Indiana State Police, and was admitted during the testimony of Lisa Black, Powers's supervisor. *Id.* The "Certificate of Analysis" consisted of an inventory of physical evidence submitted to the lab, a list of the DNA loci analyzed, the identity of the DNA profiles created (*i.e.* for Pendergrass, C.D., and the aborted fetus), and indications of where the evidence and the test results were sent. *Id.* at 3a, 48a-50a. It did not contain any test results or conclusions. *Id.*

Exhibit 2, also compiled by Powers and admitted during Black's testimony, was a table of the test results recorded by Powers and her computer entitled "Profiles for Paternity Analysis." *Id.* at 3a, 51a. The table did not contain any conclusions regarding paternity, only numbers in columns for each of the various DNA loci analyzed for each of the three test subjects. *Id.*

Black explained that Powers had created DNA profiles using Polymerase Chain Reaction (PCR) and vertical gel electrophoresis. Trial Tr. Vol. 1 at 124-26, 162. Powers used the PCR process to duplicate particular DNA strands from tissue samples taken from the three, and then used gel electrophoresis to sort sixteen loci from those strands. *Id.* at 124-26, 162-64. This process yielded a ladder-like visual for each DNA locus allowing Powers to record values for each per person. *Id.* at 162-64, 166-68. Powers used

a computer to confirm the raw values she observed. *Id.* at 168.

As Powers' supervisor, Black had reviewed Exhibit 2 during the original course of the State Police Laboratory's work. Pet. App. at 3a. Black performs technical, administrative, and random reviews of the work of DNA analysts at the Lowell and Ft. Wayne laboratories. *Id.* All DNA case work is reviewed by a second qualified analyst. *Id.* Black performed the technical review of Powers' tests on the evidence at issue in this case; accordingly, her initials appear next to each of the three samples on the DNA profile, indicating she "confirmed that this paperwork that Ms. Powers was providing to Dr. Conneally was an accurate representation of her results." *Id.* at 3a-4a. During her testimony, Black described the steps Powers took to develop the DNA profiles for each of the three samples as well as what types of samples were taken from the three subjects based on Powers' notes. *Id.* at 4a. Black also testified about the general procedures followed at the laboratory, including the receipt, storage, and testing of evidence. *Id.*

During Conneally's testimony, the court admitted Exhibit 3, a paternity index table that Conneally created. Conneally used the index to calculate the probability that Pendergrass was the father of his daughter's aborted fetus based on the laboratory's test results. *Id.* Based on the paternity index results, there was a 99.9999 percent likelihood that Pendergrass was the father of the fetus that C.D. aborted, or, in other words, Pendergrass was 2.8

million times more likely to be the father than a random man. *Id.* at 4a-5a.

The jury returned guilty verdicts on both counts. *Id.* at 5a. The trial court sentenced Pendergrass to consecutive terms of 40 years on Count I and 25 years on Count II. *Id.*

The Indiana Supreme Court affirmed, holding that Pendergrass was not denied his Sixth Amendment right of confrontation by having the opportunity to cross-examine the laboratory supervisor but not the laboratory processor. *Id.* at 14a, 38a; *Pendergrass v. State*, 913 N.E.2d 703, 709 (Ind. 2009). The court reasoned that *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), leaves it "up to the prosecutors to choose among the many ways of proving up scientific results, as long as the way chosen feature[s] live witnesses." Pet. App. at 12a. Thus, in this case, "the prosecution supplied a supervisor with direct involvement in the laboratory's technical processes and the expert who concluded that those processes demonstrated Pendergrass was the father of the aborted fetus. We conclude this sufficed for Sixth Amendment purposes." Pet. App. at 12a-13a.

REASONS FOR DENYING THE PETITION

In the wake of the Court's decision in *Melendez-Diaz* only one year ago, the States and lower courts have been implementing that decision in ways designed to conserve crime-fighting resources while protecting the rights of defendants. In that time, eight state high courts and one federal circuit have

addressed Confrontation Clause issues concerning forensic test results. *See United States v. Turner*, 591 F.3d 928 (7th Cir. 2010); *State v. Bullcoming*, 226 P.3d 1 (N.M. 2010); *Pendergrass v. State*, 913 N.E.2d 703 (Ind. 2009); *People v. Lovejoy*, 919 N.E.2d 843 (Ill. 2009); *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009); *State v. Locklear*, 681 S.E.2d 293 (N.C. 2009); *Rector v. State*, 681 S.E.2d 157 (Ga. 2009); *Smith v. State*, 28 So.3d 838 (Fla. 2009); *State v. Appleby*, 221 P.3d 525 (Kan. 2009).

Of these nine cases, however, only *Avila* and *Locklear* rejected forensic test results offered during the testimony of someone who did not conduct the test. And, as described in detail below, *Avila* and *Locklear* are distinguishable because both concerned the admissibility of a forensic pathologist's subjective autopsy conclusions rather than raw data, and in neither did the testifying witness play any role in supervising or checking the forensic test. Petitioner overgeneralizes forensic test results when asserting conflict with the decision below.

Meanwhile, Confrontation Clause issues concerning forensic test results continue to percolate in intermediate state appellate courts, wending their way to state supreme courts, which remain fully capable of resolving any conflicting decisions. *See* Pet. at 13-14 (collecting cases). If state high courts later create irreconcilable conflicts, the Court can resolve them with the benefit of more exhaustive lower-court consideration. Now, however, courts have not had enough time to create any serious fault lines in need of resolution. It would be premature for the Court to intercede.

I. No Conflict Exists Among Federal Circuits and State High Courts Regarding Testimony by Lab Supervisors or Expert Witnesses as to Raw Data Recorded by Others

Petitioner describes state high courts and federal courts of appeals as being "deeply and intractably divided" over whether the Confrontation Clause permits the government to introduce "testimonial statements" of an absent "forensic analyst" through the testimony of an analyst who did not perform the actual "laboratory analysis" described in the statements. Pet. at 8. However, rather than being in conflict with one another, the cases Pendergrass cites instead illustrate careful applications of *Melendez-Diaz* to the unique facts of each case resulting in a largely coherent—not fractured—approach to the admissibility of forensic test results.

Petitioner erroneously treats the multi-faceted series of issues surrounding the admissibility of forensic test results as if they present but one question requiring a single judicial response. This approach fails to take into account the relationship of the testifying witness to the non-testifying technician or analyst, the testifying witness's role in the original analysis, and the type of forensic test results recorded, among other factors. In the relevant cases decided so far, such material factual variations fully account for any seemingly divergent outcomes. There is, in short, no material inter-jurisdictional conflict as to the admissibility of forensic test results needing resolution.

1. First, the testifying witness's role in the forensic test accounts in large part for the cases Pendergrass alleges to be in conflict with the decision below. In the two state high court decisions cited by Pendergrass that prohibited the admission of forensic test results, the testifying witnesses were the states' chief medical examiners who were testifying regarding autopsy reports written by others. *See Commonwealth v. Avila*, 912 N.E.2d 1014, 1027 (Mass. 2009); *State v. Locklear*, 681 S.E.2d 293, 304 (N.C. 2009). In neither *Avila* nor *Locklear* had the testifying medical examiner played any role in the autopsy or in writing the report being introduced at trial. *Id.* Accordingly, both the Massachusetts and North Carolina Supreme Courts held that the medical examiners could testify as to their own opinions based on what they saw in the autopsy reports, but could not recite or otherwise testify about the conclusions of the unavailable medical examiner as contained in the autopsy reports. *Avila*, 912 N.E.2d at 1029; *Locklear*, 681 S.E.2d at 304-05.

Here, testifying lab supervisor Lisa Black played a far more substantial role in the underlying forensic test. She testified that she reviews the testing processes and oversees the general quality control of the work performed at the lab. Pet. App. 3a, 28a. With respect to this specific case, Black testified that she performed a technical review of Daun Powers's tests. *Id.*

Furthermore, Dr. Conneally, who opined as to the percentage chance that Pendergrass was the father of his daughter's aborted fetus, merely used the

results generated by Powers's DNA tests to create his own paternity index table, which in turn was the subject of his testimony. *Id.* at 34a. The courts that decided both *Avila* and *Locklear* would also apparently permit such testimony. *See Avila*, 912 N.E.2d at 1029; *Locklear*, 681 S.E.2d at 304-05. Accordingly, those cases do not conflict with this case on any level.

Furthermore, in other cases where a testifying lab supervisor has played some role in producing a forensic report, or where an expert merely renders an opinion based on the forensic report, courts have allowed the testimony. In *Rector v. State*, 681 S.E.2d 157, 160 (Ga. 2009), the testifying witness had reviewed the work of the toxicologist who originally prepared the toxicology report and had come to the same conclusion regarding the absence of cocaine in the victim's blood. The Georgia Supreme Court held that, because the testifying witness was more than a "mere conduit" for the absent doctor's findings, his testimony did not violate the Confrontation Clause: "An expert may base [his] opinions on data gathered by others." *Id.* (citation omitted).

Similarly, in *United States v. Turner*, 591 F.3d 928, 930 (7th Cir. 2010), the testifying witness was the non-testifying analyst's supervisor who, as part of his supervisory duties, had peer-reviewed the analyst's report. Neither the report nor the analyst's notes were offered into evidence. *Id.* at 933. The Seventh Circuit held that the supervisor "could testify about his personal involvement in the testing process, about the accuracy of the tests, and about

agreeing with [the non-testifying analyst] when he signed off on her report." *Id.*[1]

Here, the Indiana Supreme Court was persuaded by the testifying lab supervisor's role in the underlying DNA testing and her relationship to the non-testifying analyst. As the court observed, "[t]he laboratory supervisor who took the stand did have a direct part in the process by personally checking Powers's test results. . . . As such, she could testify as to the accuracy of the tests as well as standard operating procedure of the laboratory and whether Powers diverged from these procedures." Pet. App. 10a-11a. The court also concluded that, as a matter of hearsay law, Dr. Conneally could properly render an opinion based on data gathered by someone else. *Id.* at 13a.

This approach is allowed by *Melendez-Diaz*, which held that forensic test results could not be presented solely by affidavit, but left to prosecutors to decide the best witnesses for presenting such test results. *Melendez-Diaz*, 129 S.Ct. at 2532 n.1 ("It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the

---

[1] *People v. Lovejoy*, 919 N.E.2d 843, 866 (Ill. 2009), permitted the admission of a toxicology report compiled by a non-testifying pathologist. There the testifying witness was the State medical examiner who had relied on a non-testifying analyst's toxicology report during the course of his own postmortem examination of the victim. The Illinois Supreme Court held that the medical examiner's testimony regarding the toxicology testing was elicited to show the jury the steps he took prior to rendering an expert opinion in the case, *not* to prove the truth of the underlying assertion. *Id.* at 869.

defendant objects) be introduced live."). Furthermore, *Melendez-Diaz* says nothing to suggest that an expert may not testify based on raw data gathered by a non-testifying lab analyst.

Pendergrass contends that the discretion permitted by *Melendez-Diaz* is limited to "whose testimonial statements to present," not "whom to put on the stand for purposes of admitting a particular testimonial statement." Pet. at 27. Whatever the merits of that abstract characterization, context demonstrates that the Court was contemplating prosecutorial flexibility when it comes to introducing forensic test results. The majority was responding specifically to the concern expressed in Justice Kennedy's dissent that the majority's rule would require testimony from each person who played a role in the forensic testing process in order to introduce the test results. *Melendez-Diaz*, 129 S.Ct. at 2544-45 (Kennedy, J., dissenting). The majority rejected that understanding of its decision, stating that "it is not the case[] that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Id.* at 2532 n.1.

In any event, here testimony from a witness who supervised and checked the underlying forensic test permitted cross examination as to the general lab procedures, the procedures followed in this case, and the checks performed to confirm the technician's work. And testimony from a DNA expert who relied on the raw data to draw his conclusion that Pendergrass was 99.9999 percent likely to be the

father of his daughter's aborted fetus permitted cross-examination as to the source of the data, the expert's judgment as to the reliability of the data, and the significance of the data. Pendergrass was not convicted by affidavit—he was convicted by the in-court testimony of witnesses responsible for ensuring proper forensic testing and for analyzing the data derived therefrom.

2. Second, decisions precluding the admission of forensic test results on Confrontation Clause grounds, both before and after *Melendez-Diaz*, can be explained by reference to the type of forensic test at issue. In *Avila* and *Locklear*, and the pre-*Melendez-Diaz* decision *Commonwealth v. Nardi*, 893 N.E.2d 1221 (Mass. 2008), the courts rejected testimony about autopsies by pathologists who had no involvement with the autopsies; that is, they rejected testimony concerning another's forensic *subjective conclusions* rather than *raw data*. Here, by contrast, the non-testifying lab analyst's PCR and gel electrophoresis processes yielded objectively discernible raw data, not subjective conclusions. Indeed, the data that Powers recorded from the gel electrophoresis test was also recorded by a computer to confirm what Powers had observed. *See United States v. Turner*, 591 F.3d 928, 932-33 (7th Cir. 2010) (citing *United States v. Moon*, 512 F.3d 359, 361-62 (7th Cir. 2008) (observing that raw data from a machine that conducts a forensic test is not "testimony" in any meaningful sense).

It appears that only three other post-*Melendez-Diaz* forensic-test cases decided by state high courts have involved raw data rather than subjective

conclusions, and all agree with the decision below. In *Smith v. State*, 28 So.3d 838, 855 (Fla. 2009), the Florida Supreme Court held that the Confrontation Clause does not require the lab technician who actually performed a DNA test to testify at trial as to the data generated by the test. In *State v. Appleby*, 221 P.3d 525, 551-52 (Kan. 2009), the Kansas Supreme Court concluded that population frequency data relating to specific DNA profiles was non-testimonial, such that the person who compiled that data need not be subject to cross examination at trial in order for it to be used by a DNA expert. In *State v. Bullcoming*, 226 P.3d 1, 8-9 (N.M. 2010), the New Mexico Supreme Court ruled that data from a gas chromatograph machine was admissible through the testimony of a lab supervisor rather than the technician who operated the machine because the non-testifying technician "simply transcribed the results generated by the gas chromatograph machine . . . [and] was not required to interpret the results, exercise independent judgment, or employ any particular methodology in transcribing the results."

In light of this distinction between raw data and subjective conclusions, not even pre-*Melendez-Diaz* decisions from state high courts or federal circuits conflict with the decision below. In *State v. Johnson*, 982 So.2d 672, 681 (Fla. 2008), the Florida Supreme Court disallowed admission of a report concerning the nature of an illegal substance possessed by the defendant that was prepared by a non-testifying law enforcement analyst. Again the key was that the report represented another's *subjective conclusions* and not simply *raw data*. Indeed, post *Melendez-Diaz*, the Florida Supreme Court has distinguished

Johnson on that basis. *Smith v. State*, 28 So.2d 838, 854 (Fla. 2009).

In *State v. Mangos*, 957 A.2d 89, 93 (Me. 2008), the Maine Supreme Court held that a lab supervisor could not testify as to the contents of a technician's report describing how the technician took DNA samples from articles of clothing. Such statements do not constitute raw data. They instead describe the actions of a law-enforcement official that were offered to establish chain-of-custody. The decision in *Mangos* simply does not show how the Maine Supreme Court would view the testimony of a lab supervisor or DNA expert that relayed raw data recorded by a non-testifying lab analyst (and a computer).

In *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008) and *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005), no forensic test results, much less raw data, were at issue. In *Mejia*, the court rejected testimony by a police gang expert as to opinions he derived from custodial interrogations of gang members. *See Mejia*, 545 F.3d at 198-99. In *Goldstein* the court held that a psychologist could not testify concerning statements made during out-of-court interviews by individuals connected with the defendant. *Goldstein*, 843 N.E.2d at 732-34. *See also United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010) (ruling that a Certificate of Nonexistence of Record was not admissible through the testimony of a Border Patrol Agent as a surrogate for the immigration officer who searched for the record and

prepared the CNR recounting his actions).[2] These decisions say nothing about how those courts would handle raw data introduced at trial through a lab supervisor and relied on by an expert witness.

Finally, in *Roberts v. United States*, 916 A.2d 922, 938 (D.C. 2007), the court held that an FBI DNA expert could not include in his testimony the "conclusions" drawn by other DNA lab personnel, including another analyst. Again, the court was apparently concerned about introducing into evidence the subjective thoughts of non-testifying witnesses rather than simply raw data. But even if the court in *Roberts* was equally concerned about introducing raw data from a test run by a non-testifying lab technician, it left open the possibility that in a future case a DNA expert might still draw admissible conclusions from such raw data, as long as the expert did not testify about the raw data itself. *Id.* at 939. Given that possibility, it is hard to see how *Roberts* represents any meaningful disagreement with the decision below, where the court permitted an expert to testify as to opinions based on data gathered by a non-testifying analyst.

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[2] *Amicus curiae* National Association of Criminal Defense Lawyers outlines an apparent circuit conflict relating to the admissibility of CNRs through witnesses who did not prepare them. NACDL Br. at 10 n.5. That vein of cases simply underscores the point that the Court cannot treat all *Melendez-Diaz*-related issues as one—it needs to view various applications of *Melendez-Diaz* discretely. In the circumstances presented here—DNA test data admitted through a lab supervisor and an expert witness—there is no lower-court conflict, and no need for the Court's intervention.

II. Unless It Intends to Reconsider *Melendez-Diaz*, the Court Should Allow More Robust Percolation Before Taking Another Lab-Test Certification Case

Particularly given the variety of admissibility issues that forensic-test cases can present, state appellate courts need to implement *Melendez-Diaz* in many more cases before this Court reviews another one. Even the state high court decisions that rejected the admissibility of forensic test results have been distinguished or reinterpreted by the intermediate appellate courts of those very states. In short, the issues presented in this case are still percolating through lower courts in the wake of *Melendez-Diaz*. For the Court to jump in now would be premature.

1. Nowhere is an ongoing internal state appellate debate more evident than in California. Prior to *Melendez-Diaz*, the California Supreme Court held in *People v. Geier*, 161 P.3d 104, 139-40 (Cal. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), that a DNA report was not testimonial because it was prepared as part of a non-adversarial process using standardized scientific protocol and therefore constituted a contemporaneous recordation of observable events rather than the documentation of past events. Accordingly, the court held that testimony as to the results by an expert who did not perform the test was admissible. *Id.*

Now, following *Melendez-Diaz*, California's intermediate appellate courts are split as to the validity of *Geier* in determining when the Confrontation Clause requires forensic test results to

be admitted through the testimony of the technician or analyst who conducted the test. *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 408, 411-12 (Cal. Ct. App. 2009), relied on *Geier* and permitted testimony concerning the results of a machine-generated toxicology test conducted during an autopsy by a witness who did not conduct the toxicology test but who was an expert qualified to interpret and explain the test results and had peer-reviewed the tests and signed the final reports. *People v. Gutierrez*, 99 Cal. Rptr. 3d 369, 375 (Cal. Ct. App. 2009), similarly permitted a supervisor to testify concerning the results of a sexual-assault examination conducted by a subordinate.

Meanwhile, *People v. Dungo*, 98 Cal. Rptr. 3d 702, 713-14 (Cal. Ct. App. 2009), rejected testimony about the findings in an autopsy report by someone other than the pathologist who created the report. In *People v. Lopez*, 98 Cal. Rptr. 3d 825, 829 (Cal. Ct. App. 2009), the court determined that *Melendez-Diaz* necessarily rejected the approach of *Geier* and held that a toxicology report was inadmissible hearsay unless the analyst who actually compiled the data testified.

The California Supreme Court has granted review in all four cases, and as the NACDL notes, the California Court of Appeals in the meantime continues to generate decisions on similar issues. NACDL Br. at 10-11. The California Supreme Court, therefore, will have a variety of circumstances for developing a circumspect application of Confrontation Clause doctrine to forensic-test admissibility issues. There is no benefit for this

Court to speed ahead of the California Supreme Court in an attempt to provide guidance down one narrow alleyway of forensic-test admissibility.

This is all the more true because California is not the only state where these issues are still being fleshed out in state appellate courts. As discussed above, the North Carolina Supreme Court has rejected testimony by the state's chief medical examiner concerning the results of an autopsy and forensic dental analysis performed by non-testifying pathologists. *State v. Locklear*, 681 S.E.2d 293, 305 (N.C. 2009). However, North Carolina's appellate courts have distinguished *Locklear* in cases involving testimony about DNA and toxicology data. *State v. Mobley*, 684 S.E.2d 508, 511 (N.C. Ct. App. 2009), *review denied* 2010 WL 1019366 (N.C. Jan. 28, 2010) (distinguishing *Locklear* because the witness testified "not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data"); *State v. Hough*, 690 S.E.2d 285, 291 (N.C. Ct. App. 2010) (approving testimony that is "based on an independent review and confirmation of test results, unlike the situations presented in *Melendez-Diaz* [and] *Locklear*").

In Texas, two intermediate appellate courts have rejected the admission of autopsy reports without the testimony of the person who wrote the reports, but have said they would permit expert testimony *based on* those reports. *See Wood v. State*, 299 S.W.3d 200, 213 (Tex. App. 2009); *Martinez v. State*,

2010 WL 1067560, at *6 (Tex. App. March 24, 2010). Meanwhile, a third intermediate appellate court has held that the Confrontation Clause is not violated when a forensic lab supervisor testifies as to his "opinion[] based on data generated by scientific instruments operated by other scientists. . . ." *Hamilton v. State*, 300 S.W.3d 14, 22 (Tex. App. 2009). The Texas Court of Criminal Appeals will at some point have an opportunity to review these holdings, has not yet weighed in.

The point is that state courts are still in the process of interpreting *Melendez-Diaz* and applying it to the wide variety of cases they face. Until more state high courts have attempted to resolve a broader range of forensic-test admissibility issues in the wake of *Melendez-Diaz*, this Court's intervention would be inexpedient.

2. The only rationale for taking another forensic-test case at this point would be to reconsider *Melendez-Diaz* itself. In *Briscoe v. Virginia*, No. 07-11191, Indiana and Massachusetts, on behalf of 26 states plus the District of Columbia, urged outright reconsideration of *Melendez-Diaz*. *See* Brief of the State of Indiana, *et al.*, *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010), *available at* 2009 WL 3652660. The States argued that principles of *stare decisis* permit swift reconsideration of criminal procedure precedent and that lab test results are not testimonial statements. *Id.* Ultimately, the Court merely vacated the decision of the Virginia Supreme Court and remanded the case for further consideration in light of *Melendez-Diaz*. *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010) (mem.).

Given the lack of any genuine lower-court conflict and the need for greater nationwide percolation of forensic-test admissibility issues, the opportunity to reconsider *Melendez-Diaz* really provides the only persuasive rationale for considering another forensic-test case just now. Hence, if the Court grants the petition, Indiana intends once again to make the argument for overturning *Melendez-Diaz*.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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RICHARD PENDERGRASS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Indiana Supreme Court

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REPLY BRIEF FOR PETITIONER

The State does not, and cannot, dispute that the forensic analysis that its employees performed here was typical of those regularly done in laboratories across the country. An analyst, Daun Powers, extracted specimens from physical evidence and conducted several scientific procedures on them. Pet. 3-4. Those procedures ultimately generated a series of computerized images (here, "ladder-like visual[s]," BIO 2; in another case, the images might be graphs or color stains) that the analyst "interpret[ed]." Tr. 167.[1] The analyst then prepared two written reports detailing the evidence she had handled, the procedures she had performed, and the conclusions she had drawn (here, that the specimens contained particular DNA segments of certain lengths). Pet. App. 48a-51a. After the analyst completed her work, her supervisor, Lisa Black, reviewed the "paperwork" and initialed the reports, Pet. App. 3a, without any indication that she personally examined the physical specimens or the "ladder-like visuals" to independently interpret them.[2]

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[1] For an example of such a DNA image, see http://upload.wikimedia.org/wikipedia/commons/6/60/Gel_electrophoresis_2.jpg. For a description of how to interpret one, see http://www.life.illinois edu/molbio/geldigest/photo.html.

[2] Lest there be any confusion about what exactly Black did, the State elicited the following explanation from Black at trial:

> Q. And who was the analyst that conducted that testing?
>
> A. Daun Powers.
>
> . . . .

This case, therefore, turns on a purely legal question: whether the Confrontation Clause permitted the State to introduce one analyst's forensic reports through the in-court testimony of a different analyst. The State does not dispute that the permissibility of such surrogate testimony is an important and recurring constitutional issue. The State nevertheless urges this Court to deny certiorari on the grounds that: (1) the conflict among lower federal and state courts on the issue actually turns on factual distinctions; (2) the Indiana Supreme Court's decision is "allowed by *Melendez-Diaz* [*v. Massachusetts*, 129 S. Ct. 2527 (2009)]," BIO 9; and (3) given how recently *Melendez-Diaz* was decided, "[t]he only rationale for taking another forensic-test case at this point would be to reconsider *Melendez-Diaz* itself," BIO 18. None of these arguments

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Q. . . . Can you identify [Exhibit 1], please?

A. This is the Certificate of Analysis that was prepared by Daun Powers on her results.

Q. Okay. And was that – you said that you were the supervisor involved in this case; is that correct?

A. That is correct.

Q. And is that document prepared at or near the time Daun is conducting the analysis?

A. Yes, it was.

Q. And reviewed then by you as the supervisor?

A. Yes. And that's indicated down at the bottom. It says reviewed by and it has my number 4774 which is my public employee number which indicates that I did review it.

Tr. 127, 130-31 (Oct. 1, 2007).

provides reason to delay resolving the escalating split of authority.

1. Courts have acknowledged the conflict over whether the prosecution may introduce one forensic analyst's report through the in-court testimony of another. *See United States v. Blazier*, 68 M.J. 439, 444 (2010); *United States v. Rose*, 587 F.3d 695, 701 n.4 (5th Cir. 2009), *cert. denied*, 2010 WL 545453 (2010). Nine state supreme courts or federal courts of appeals hold that the import of *Melendez-Diaz* and *Crawford v. Washington*, 541 U.S. 36 (2004), is straightforward and clear cut: The only person through whom the prosecution may introduce a forensic report into evidence is the report's author. *See* Pet. 12-15, 17-18; *United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010). By contrast, five other state supreme courts permit prosecutors to introduce a nontestifying analyst's report through the in-court testimony of a different analyst. *See* Pet. 15-16, 18-19; *State v. Bullcoming*, 226 P.3d 1, 8-9 (N.M. 2010), *pet'n for cert. filed* (May 12, 2010) (No. 09-10876); *see also State v. Lopez*, ___ N.E.2d ___, 2010 WL 703250, at *12 (Ohio App. Mar. 1, 2010) (same).[3]

Contrary to the State's arguments, this conflict cannot be explained by differences in (a) the testifying analyst's level of involvement in producing

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[3] The North Dakota Supreme Court similarly has held that *Melendez-Diaz* allows the prosecution to introduce an affidavit establishing a link in the chain of custody of forensic evidence without putting the declarant on the stand. *State v. Gietzen*, ___ N.W.2d ___, 2010 WL 1855952, at *4 (N.D. May 11, 2010).

the forensic reports; or (b) the type of forensic testing at issue.

a. According to the State, courts prohibit surrogate testimony only where the testifying analyst did not "play[] any role" in the production of the report, whereas courts allow such testimony where, as here, the testifying analyst "reviewed" the nontestifying analyst's forensic report. BIO 7-9. This is not so.

The courts that bar surrogate testimony in fact have adopted a categorical rule: the Confrontation Clause prohibits the prosecution from introducing one person's testimonial statements through the in-court testimony of another. *See, e.g., Martinez-Rios*, 595 F.3d at 586 (Confrontation Clause violated when the defendant is "unable to cross-examine the person who . . . prepared a testimonial statement"); *Smith v. State*, 28 So.3d 838, 854-55 & n.12 (Fla. 2009) (same), *pet'n for cert. filed* (May 10, 2010) (No. 09-10755); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009) (same). Under these courts' reasoning, it does not matter whether a testifying witness reviewed the reports at issue. The only relevant question is whether the prosecution introduced an analyst's forensic report without putting *that analyst* on the stand. That is exactly what the prosecution did here.

In any event, courts *have* found confrontation violations in cases identical to petitioner's. Here, Black, the testifying analyst, "oversees the general quality control of the work performed at the lab," and "performed a technical review of Daun Powers' tests." BIO at 7. The testifying analyst in *State v. Johnson*, 982 So.2d 672 (Fla.), *cert. dismissed*, 129 S. Ct. 28

(2008), likewise was a "supervisor" who "testif[ied] about the general procedures used . . . in preparing" the type of forensic report at issue; he also reviewed the nontestifying's analyst report. *Smith*, 28 So.3d at 854 (quoting lower court opinion in *Johnson*); Br. for Pet'r at 2, *Johnson*, 982 So.2d 672 (No. SC06-86), 2006 WL 1028700 at *2. Similarly, the testifying analyst in *Martinez-Rios* "explained how [the report at issue] is ordinarily prepared" and "personally reviewed" the report that the nontestifying analyst prepared. 595 F.3d at 586.

Contrary to the State's assertion (BIO 17), intermediate court decisions from North Carolina confirm that *State v. Locklear*, 681 S.E.2d 293 (N.C. 2009), likewise bars surrogate testimony under these circumstances. In *State v. Brewington*, ___ S.E.2d ___, 2010 WL 1957477 (N.C. App. May 18, 2010), the prosecution, just as here, introduced one analyst's report through the testimony of another who was able to testify regarding general lab procedures but who did not herself assess the physical evidence or conduct any testing on it. *Id.* at *2, *9; *compare* Pet. App. 4a (Black testified regarding "general procedures followed at the laboratory" but "d[idn't] have any knowledge" regarding the actual steps taken here). The prosecution argued, just as here, that the surrogate testimony did not violate the Confrontation Clause because the testifying analyst "reviewed the testing procedures . . . and the results of the examinations." *Brewington*, 2010 WL 1957477, at *2. The court rejected this argument, in terms that explain why the "role in the analysis" distinction the State proposes here lacks any grounding in this Court's precedent:

> It is clear from the testimony of [the testifying analyst] that she . . . [did not] conduct any independent analysis of *the substance*. She merely reviewed the reported findings of [the nontestifying analyst], and testified that if [that analyst] followed procedures, and if [that analyst] did not make any mistakes, and if [that analyst] did not deliberately falsify or alter the findings, then [the testifying analyst] would have come to the same conclusion that she did. As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely these "ifs" that need to be explored upon cross-examination to test the reliability of the evidence.
>
> . . . .
>
> Under *Melendez-Diaz* and *Locklear*, we are bound to conclude this testimony was admitted in violation of defendant's right under the Confrontation Clause of the Sixth Amendment.

Id. at *9; *accord State v. Galindo*, 683 S.E.2d 785, 788 (N.C. App. 2009).

The cases the State cites do not suggest otherwise. In those cases, the North Carolina Court of Appeals distinguished *Locklear* on the ground that the testifying analysts never referenced the nontestifying analysts' reports "for the proof of the matter asserted." *State v. Hough*, 690 S.E.2d 285, 291 (N.C. App. 2010); *accord State v. Mobley*, 684 S.E.2d 508, 512 (N.C. App. 2009). The State does not even contend that the testifying analysts in this case so limited their testimony. Nor could it, since the

analysts' testimony depended on the accuracy of the reports, and the State itself urged the jury "to look at the lab report[s]" as substantive proof of its charges. Pet. 6-7 (quoting trial transcript); *see also* Pet. 28-30. When the prosecution introduces forensic reports in this manner, the North Carolina courts, as well as eight other state and federal courts, hold that it violates the Confrontation Clause.

b. The State also contends that the conflicting cases can be distinguished according to whether the forensic report the prosecution introduced involved "objectively discernible" facts or "subjective conclusions." BIO 11. Here, too, the State is incorrect.

To the extent the State suggests, by its citation to *State v. Appleby*, 221 P.3d 525 (Kan. 2009), that the forensic reports in this case, or any other of the cases in the split, are nontestimonial, this is not so. As the Indiana Supreme Court acknowledged, the reports here are "testimonial [under] the definition of testimony as clarified by *Melendez-Diaz*." Pet. App. 10a. Other courts on both sides of the conflict likewise hold that forensic reports are testimonial, regardless of whether they recite "objectively discernible" data or more subjective conclusions. *Compare, e.g.*, *Bullcoming*, 226 P.3d at 8, *with State v. Mangos*, 957 A.2d 89, 93 (Me. 2008). And rightly so: this Court made clear in *Melendez-Diaz* that forensic reports cannot be deemed nontestimonial on the ground that they supposedly reflect "neutral, scientific testing." 129 S. Ct. at 2536.

To be sure, the court in *Appleby* held that the forensic documents at issue there were nontestimonial. 221 P.3d at 551. But those documents were machine-generated printouts containing no

human assertions. *Id.* at 548-49. The documents, therefore, constituted genuine "raw data," which does not implicate the Confrontation Clause or the question presented here. *See* Pet. 10-11; *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009).

Here, by contrast, the State did not simply introduce computer printouts; it did not, for example, introduce the "ladder-like visual[s]," BIO 2, that Powers' tests generated. Instead, the State introduced Powers' written assertions describing the evidence she tested, the procedures she followed, and the results she observed. *See* Pet. App. 48a-51a. Much as the State attempts to imply otherwise, those assertions are *not* "raw data." They are testimonial statements.

The State is equally mistaken to the extent it means to suggest, by its citation to the New Mexico Supreme Court's decision in *Bullcoming*, 226 P.3d 1, that no court would have prohibited surrogate testimony about the testimonial reports here because they contain supposedly "objectively discernible" facts. Courts that prohibit surrogate testimony do not read the requirements of *Crawford* and *Melendez-Diaz* to depend on the nature of the testimonial statements in a forensic report. Rather, courts interpret those decisions as establishing a categorical rule: "when the State seeks to introduce forensic analyses, . . . such evidence is inadmissible" unless the authors themselves testify. *Locklear*, 681 S.E.2d at 305. Thus, courts have found confrontation violations when the prosecution introduced one analyst's objectively discernible assertions though the in-court testimony of another. *See Martinez-Rios*,

595 F.3d at 586 (prosecution introduced report certifying nonexistence of certain immigration records); *Avila*, 912 N.E.2d at 1029 n.19 (prosecution introduced "*facts* and findings" in an autopsy report) (emphasis added).

Contrary to the State's suggestions (BIO 12-13), the high courts in Maine and Florida would also have found confrontation violations on the facts here. In *Mangos*, the Maine Supreme Judicial Court found a confrontation violation where the report introduced through surrogate testimony "describ[ed] how the technician took DNA samples" for testing. BIO 13; *Mangos*, 957 A.2d at 93. That is exactly what Powers' Certificate of Analysis describes here. Pet. App. 48a-50a. In *Johnson*, the Florida Supreme Court found a confrontation violation where a report introduced through surrogate testimony identified a seized substance as containing cocaine. 982 So.2d at 680. While the State claims that "the key was that the report represented another's *subjective conclusions*" instead of objective observations, BIO 12, the Florida Supreme Court never identified this as "the key," or even as a relevant factor. Rather, in a decision after *Melendez-Diaz*, the court made clear that the surrogate testimony in *Johnson* violated the Confrontation Clause simply because "*the person who prepared the report of the relevant results did not testify.*" *Smith*, 28 So.3d at 854 (emphasis in original); *see also id.* at 855 n.12.

Nor would it make any sense for courts to distinguish among instances of surrogate testimony according to the level of subjectivity in the reports at issue. BIO 11. This Court explained in *Melendez-Diaz* that "there is not a . . . category of witnesses,

helpful to the prosecution, but somehow immune from confrontation" on the basis of the supposed objectivity of their assertions. 129 S. Ct. at 2534; *see also id.* at 2537 n.6. Were it otherwise, the prosecution could use surrogate witnesses to introduce testimonial statements that recorded the time on a clock when shots rang out or that transcribed the numbers on a license plate of a getaway car. These assertions are just as "objective" as any assertion in a forensic report might be. But if there is one thing that *Crawford* and *Melendez-Diaz* make clear, it is that courts may no longer deem the Confrontation Clause satisfied merely because they believe a particular statement is so objective or otherwise "obviously reliable" that cross-examining the witness who made it is unnecessary. *Crawford*, 541 U.S. at 62; *Melendez-Diaz*, 129 S. Ct. at 2536.

2. As for the merits of the Indiana Supreme Court's decision, the State does not dispute that the Confrontation Clause generally bars the prosecution from introducing a person's testimonial statements without putting that person on the stand. *See Crawford*, 541 U.S. at 54. But the State contends that footnote one in *Melendez-Diaz* creates an exception to this rule, "le[aving it] to prosecutors to decide" through whom they wish to introduce testimonial statements in forensic reports. BIO at 9.

As the Petition explained (Pet. 27), that footnote does no such thing. Rather, it simply reaffirms that the Confrontation Clause imposes nothing more, and nothing less, than a "procedural" requirement regarding prosecutorial witnesses. *Crawford*, 541 U.S. at 61. The prosecution always has discretion (subject to state laws regulating the elements of

crimes and permissible methods of proving them) to decide which witnesses it chooses to put on the stand at trial. Thus, footnote one makes clear that nothing in the Confrontation Clause requires the prosecution to call "everyone who laid hands on the evidence" that is the subject of a forensic report. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1. At the same time, "what testimony *is* introduced must (if the defendant [invokes the Confrontation Clause]) be introduced live." *Id.* In other words, the prosecution may choose whose testimonial statements concerning forensic evidence it wishes to introduce, but once it elects to introduce a certain analyst's testimonial statements, it must put *that analyst* on the stand. It may not introduce one analyst's testimonial statements through the in-court testimony of another. *See id.* at 2537 n.6 ("The analysts who swore the affidavits" the prosecution introduced "provided testimony against [the defendant], and they are therefore subject to confrontation.").

As this Court emphasized in *Melendez-Diaz*, this procedural mandate is not "an empty formalism." *Id.* Forensic science is subject to error, manipulation, and fraud, *id.* at 2536-37, and DNA testing is no exception. *See, e.g.*, Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 Emory L.J. 489, 491, 501 (2008). Indeed, one of the steps of forensic testing that the nontestifying analyst's reports record here – that of "interpret[ing] the machine's printout" – "is the one [during forensic testing] most likely to permit human error to affect the test's result." *Melendez-Diaz*, 129 S. Ct. at 2545 (Kennedy, J., dissenting). When the prosecution

introduces such interpretive assertions, the only way the defendant can exercise his constitutional right to explore the declarant's "honesty," "methodology," or "deficiency in judgment" is by cross-examining the actual declarant who made the assertions. *Id.* at 2537-38 (majority opinion). A surrogate witness shields all of that information from adversarial scrutiny. Pet. 20-22.

3. Most revealing of all is the State's assertion that if and when this Court grants certiorari to resolve the conflict over the permissibility of surrogate forensic testimony, it will – as it did earlier this Term as *amicus* in *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) – "make the argument for overturning *Melendez-Diaz*." BIO 19. This assertion, coupled with various arguments elsewhere in the State's brief, makes it plain that Indiana and other states are really just refusing to come to terms with *Melendez-Diaz*. Until this Court reaffirms that it meant what it said in *Melendez-Diaz*, states will continue to urge their courts to transform that decision's straightforward, categorical requirement of live testimony into a malleable, multi-factor test that fails to provide consistent outcomes or predictable guidance to trial courts in their daily encounters with forensic evidence. BIO 6, 18. Especially in light of the division of authority that has already developed on the subject, this is not a recipe for further percolation; it is a circumstance requiring immediate intervention.

CONCLUSION

The petition for certiorari should be granted.

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IN THE

Supreme Court of the United States

RICHARD PENDERGRASS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in knowing whether testifying witnesses may be used to introduce reports and other evidence prepared exclusively by non-testifying witnesses.

In the wake of *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), courts have routinely wrestled with the question of whether the Confrontation Clause

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received notice of *amicus curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

permits this form of surrogate testimony. This practice poses serious problems because it fundamentally alters the structure of a criminal trial, hampers its truth-seeking function, and ultimately threatens the integrity of our criminal justice system. To delay intervention will perpetuate confusion and facilitate injustice in a substantial number of criminal cases nationwide.

I. THE INDIANA SUPREME COURT'S DECISION IS CONTRARY TO THE SIXTH AMENDMENT.

1. This Court's opinion in *Melendez-Diaz* v. *Massachusetts* means what it said, and said what it means: "[a] witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." 129 S. Ct. 2527, 2531 (2009). In the instant case, Daun Powers, the analyst who tested the DNA evidence linking Mr. Pendergrass to C.D.'s aborted child and prepared the reports documenting those tests, did not appear at trial. See Pet. App. 2a-3a. Moreover, the State has never claimed that Mr. Pendergrass had another opportunity to cross-examine Ms. Powers. Instead, Ms. Powers' DNA reports—which the Indiana Supreme Court held were testimonial in nature—were introduced into evidence through the testimony of Lisa Black, Powers' supervisor at the Indiana State Police Laboratory. See Pet. App. 2a, 22a.

Those stark facts notwithstanding, a bare majority of the Indiana Supreme Court concluded that no Sixth Amendment violation occurred because the prosecution called two other witnesses—one familiar with Ms. Powers' general work habits and compliance with lab procedures, the other a DNA expert who concluded on the basis of Powers' report that Mr. Pendergrass was the father of C.D.'s aborted child. Pet. App. 9a-10a. In essence, this innovative approach dictates that the Confrontation Clause is satisfied so long as *someone* knowledgeable about the testimony and familiar with its author's general work habits takes the stand. See Pet. App. 15a-16a (Rucker, J., dissenting).

Such an approach is plainly inconsistent with the text of the Sixth Amendment, which guarantees a defendant the right to "be confronted with *the* witnesses against him," U.S. Const. amend. VI (emphasis added), and the holding in *Crawford* v. *Washington* that "[t]estimonial statements of witnesses absent from trial" may only be admitted when "*the declarant* is unavailable" and "the defendant has had a prior opportunity to cross-examine." 541 U.S. 36, 59 (2004) (emphasis added). Although the administrative ease offered by the Indiana Supreme Court's rule has superficial appeal, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54.

2. In addition to its inconsistency with the text and this Court's precedents, the Indiana Supreme Court's rule would also encourage prosecutors to consistently call professional witnesses with only an indirect connection to the forensic testing at issue. *Amicus* and its members hold a strong interest in ensuring that courts' truth-seeking function is not undermined by the use of witnesses whose professional reputations hinge on the competence and accuracy of their subordinates, or who are specially trained to evade difficult questions on cross-examination.

The instant case illustrates this concern. Lisa Black, the witness used by the State to introduce Ms. Powers' test results, serves as a senior supervisor within the Indiana State Police Laboratory. See Pet. App. 3a, 22a; *Patterson* v. *State*, 729 N.E.2d 1035, 1040 (Ind. Ct. App. 2000) (identifying Ms. Black as the "DNA supervisor for the North Zone of the Indiana State Police Laboratory"). In this capacity, Ms. Black regularly testifies in Indiana criminal

trials. See, *e.g.*, *Glenn* v. *State*, No. 45A05-0808-PC-462, 2009 WL 1099255, at *11-12 (Ind. Ct. App. Apr. 22, 2009); *Parish* v. *State*, 838 N.E.2d 495, 501 (Ind. Ct. App. 2005); *Miller* v. *State*, 702 N.E.2d 1053, 1061 (Ind. 1998); *Tapia* v. *State*, 569 N.E.2d 655, 657 (Ind. 1991). By 2000, Ms. Black had "testified in court approximately eighty times as a forensic examiner." *Patterson*, 729 N.E.2d at 1040. Further, courts have noted Ms. Black's impressive credentials, including a bachelor's degree in biochemistry, ten years of experience in forensic serology, and FBI training in DNA analysis. *Id.*

These qualities make Ms. Black an extremely knowledgeable and by all accounts, convincing, witness. They do not, however, include the one thing the Confrontation Clause requires: authorship of the testimonial evidence introduced at trial.[2] See *Melendez-Diaz*, 129 S. Ct. at 2537-38. Allowing supervisors such as Ms. Black to testify regarding forensic tests conducted by third party analysts such as Ms. Powers would, in effect, strip defendants of the opportunity to probe the analyst's "honesty, proficiency, and methodology;" thus making it impossible to "weed out" fraudulent analysts as well as incompetent ones. *Id.* Likewise, allowing experienced supervisors to testify in place of new, thinly credentialed analysts may give test results a veneer of credibility they do not deserve in some cases. This problem is compounded by the fact that supervisors may be particularly solicitous of the work done by employees in their charge or reluctant to share doubts about that work lest doing so reflect

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[2] Indeed, "[t]here is no evidence Ms. Black did anything more than rubber stamp the results of Ms. Powers' work." Pet. App. 15a (Rucker, J., dissenting).

poorly on the supervisor's own skill and standing as a manager.[3]

Conversely, the approach advocated by Petitioner—requiring the analyst who actually prepared the statements introduced into evidence to testify at trial—would permit precisely the kind of cross-examination contemplated by the Confrontation Clause and underscored in *Melendez-Diaz*. See Pet. App. 24-26. Importantly, this approach would place no additional burden on the state, since it would not require *additional* witnesses. Instead, Petitioner's straightforward rule would simply require a *different* witness than Ms. Black.

3. This case, like *Melendez-Diaz*, represents a "rather straightforward application" of this Court's holding in *Crawford*. *Melendez-Diaz*, 129 S. Ct. at 2532. Both cases make it clear that the State was not free to introduce Ms. Powers' test results unless Ms. Powers either testified at trial or was otherwise available to be cross-examined. To the extent there is any ambiguity on that point, the deleterious effect of the Indiana Supreme Court's rule on courts' truth-seeking function provides a clear rationale for disallowing surrogate forensic testimony. As a result, the Indiana Supreme Court's decision clearly contradicts the Sixth Amendment and warrants review by this Court.

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[3] *Cf.* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 24 (2009); Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 500 (2006) (citing a report indicating that a lab analyst's supervisors "may have ignored or concealed complaints of his misconduct").

II. THE INDIANA SUPREME COURT CONSTRUED THIS COURT'S DECISION IN *MELENDEZ-DIAZ* V. *MASSACHUSETTS*, MAKING THIS CASE RIPE FOR REVIEW.

Recently, in *Briscoe* v. *Virginia*, this Court granted certiorari, vacated the decision below, and remanded for further consideration in light of the decision in *Melendez-Diaz*. See No. 07-11191, 2010 WL 246152 (U.S. Jan. 25, 2010) (per curiam). The lower court decision in *Briscoe* was issued prior to, and thus did not consider, this Court's decision in *Melendez-Diaz*. See *Magruder* v. *Virginia*, 275 Va. 283, 657 S.E.2d 113 (2008), *cert. granted sub nom. Briscoe* v. *Virginia*, 129 S. Ct. 2858 (2009). The same holds true for several other Confrontation Clause decisions ultimately vacated and remanded after *Melendez-Diaz* was decided. See *People* v. *Barba*, No. B185940, 2007 Cal. App. Unpub. LEXIS 9390 (Cal. Ct. App. Nov. 21, 2007), *vacated*, 129 S. Ct. 2857 (2009); *State* v. *Crager*, No. 9-04-54, 2008 WL 2582591 (Ohio Ct. App. June 30, 2008), *vacated*, 129 S. Ct. 2856 (2009).

In contrast to each of these cases, the Indiana Supreme Court clearly construed *Melendez-Diaz* when it decided the instant case. The opinion below cites *Melendez-Diaz* thirteen times and is premised explicitly on an interpretation of *Melendez-Diaz*'s admonition that the class of analysts who must testify in order to satisfy the Confrontation Clause does not include "everyone who laid hands on the evidence" at issue. See Pet. App. 9a (quoting *Melendez-Diaz*, 129 S. Ct. at 2532 n.1). On this basis, a majority of the Indiana Supreme Court concluded that the testimony of "a supervisor with direct involvement in the laboratory's technical processes" was sufficient to meet the Confrontation Clause test

set forth in *Melendez-Diaz*. Pet. App. 10a.

Because the Indiana Supreme Court—unlike the lower courts in *Barba*, *Briscoe*, and *Crager*—carefully considered *Melendez-Diaz* when deciding the Sixth Amendment question, the instant case presents an ideal vehicle for further clarification of the extent to which expert witnesses may be used to admit testimony prepared by third parties.

III. THE SPLIT OF AUTHORITIES REGARDING THE CONSTITUTIONALITY OF SURROGATE TESTIMONY HAS CONTINUED TO DEEPEN SINCE THE PETITION FOR CERTIORARI WAS FILED.

In the brief period that has elapsed even since Mr. Pendergrass filed his petition for certiorari (filed on January 19, 2010), the split of authorities regarding the compatibility of surrogate testimony with the Confrontation Clause has grown deeper. In addition to the numerous cases cited in the petition, see Pet. for Cert. 12-19, the Fifth Circuit and two California appellate courts have also recently addressed the question of whether testimonial statements of a non-testifying witness may be introduced via the in-court testimony of an expert witness.[4]

1. In *United States* v. *Martinez-Rios*, No. 08-40809, 2010 U.S. App. LEXIS 2051 (5th Cir. Jan. 28, 2010) (per curiam), the Fifth Circuit addressed the

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[4] A North Carolina appellate court has also recently ruled on this issue. In *State* v. *Conley*, No. COA09-456, 2010 WL 157554 (N.C. Ct. App. Jan. 19, 2010), the Court of Appeals of North Carolina followed the North Carolina Supreme Court's earlier decision in *State* v. *Locklear*, 681 S.E.2d 293 (N.C. 2009), and held that a testifying agent's repetition of, and reliance upon, a non-testifying agent's forensic findings constituted a Sixth Amendment violation. *Conley*, 2010 WL 157554, at *7-8.

admissibility of a Certificate of Non-existence of Record ("CNR") through surrogate testimony. The CNR, which was used to demonstrate that the defendant had not obtained consent to re-enter the United States, was prepared by a U.S. Citizenship and Immigration Services (USCIS) employee who did not testify at trial. Rather, the prosecution introduced the CNR through the testimony of a Border Patrol agent who "explained how a CNR is processed." *Id.* at *4. The trial court admitted the CNR into evidence pursuant to the Fifth Circuit's decision *United States* v. *Rueda-Rivera*, which classified CNRs as ordinary business records rather than testimonial statements subject to the Confrontation Clause. 396 F.3d 678, 680 (5th Cir. 2005) (per curiam).

On appeal, the Fifth Circuit held that *Melendez-Diaz* had overruled *Rudea-Rivera* for three reasons. First, *Melendez-Diaz* singled out record certifications as testimonial in nature, since such certifications "would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched." *Martinez-Rios*, 2010 U.S. App. LEXIS 2051, at *9-10 (quoting *Melendez-Diaz*, 129 S. Ct. at 2539). Second, the court reasoned that CNRs "are not routinely produced in the course of government business but instead are exclusively generated for use at trial." *Id.* at *10. Third, the CNR, like the certificate of analysis at issue in *Melendez-Diaz*, was used to establish a fact necessary to convict the defendant (the absence of authorization for the defendant to re-enter the United States). *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2533). Because the CNR was testimonial in nature, and because the USCIS employee who prepared it did not testify at trial, the court held that

the defendant's Sixth Amendment confrontation right was violated. *Id.* at *11-12.[5]

2. A pair of recent cases from the California Courts of Appeal adds to the already significant confusion among the lower courts regarding the proper application of *Melendez-Diaz* to surrogate testimony.

In the first of these two cases, *California* v. *Schwarz*, No. C059021, 2010 Cal. Ct. App. Unpub. LEXIS 378 (Cal. Ct. App. Jan. 21, 2010), the police found what appeared to be illegal drugs during a search of the defendant's home and subsequently charged the defendant with possession of methamphetamine. *Id.* at *1. An employee of the Sacramento County District Attorney's Laboratory of Forensic Services analyzed the substance seized from the defendant's home and prepared a report identifying the substance as methamphetamine. *Id.* at *3-5. At trial, the employee's supervisor, rather than the employee, testified regarding the methamphetamine, and the employee's report was introduced into evidence. *Id.* On this basis of this

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[5] Two recent federal court of appeals decisions point in opposite directions on this issue. In addressing whether an I-213 immigration form is testimonial, the Eleventh Circuit concluded in passing that CNRs are not testimonial. *See United States* v. *Caraballo*, No. 09-10428, 2010 U.S. App. LEXIS 1873 (11th Cir. Jan. 27, 2010). Citing *Rudea-Rivera* as its basis, the court expressly distinguished CNRs from the testimonial certificate of analysis at issue in *Melendez-Diaz*. *See id.* at *33-34. *United States v. Norwood*, a Ninth Circuit case on remand from this Court, took the opposite approach. There, the United States conceded that under *Melendez-Diaz*, a CNR-like agency report "should not have been admitted without [its author] presenting herself at trial for examination." *United States* v. *Norwood*, No. 08-30050, 2010 U.S. App. LEXIS 3042, at *7-8 (9th Cir. Feb. 17, 2010).

evidence *alone*, a jury found the defendant guilty of methamphetamine possession. *Id.* at *1, 8.

The Court of Appeal overturned that conviction on Sixth Amendment grounds, since the defendant "had no effective means to challenge whether . . . the laboratory analyst[ ] correctly performed the tests reflected by her written report." *Id.* at *8. While the supervisor had nearly three decades of experience with analysis of controlled substances and knew the analyst well, the court held that under *Melendez-Diaz* the employee who had actually analyzed the evidence had to testify in order to satisfy the Confrontation Clause. *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2531-32).

In *California* v. *Gutierrez*, No. B213488, 2010 Cal. App. Unpub. LEXIS 425 (Cal. Ct. App. Jan. 21, 2010), the Court of Appeal encountered a nearly identical Confrontation Clause question and reached the opposite conclusion. In *Gutierrez*, authorities recovered several tissue samples from a rape victim. *Id.* at *4-5. A "criminalist"—California's term for a state-employed forensic analyst—extracted male DNA from the samples, "typed" the DNA, and prepared a report discussing his findings. *Id.*

At trial, a different criminalist, not involved in any of the procedures described above, testified regarding the DNA evidence. *Id.* at *6-7. According to the Court of Appeal, this testifying criminalist "informed the jury" of the non-testifying criminalist's findings and "rel[ied] on the DNA profile [the non-testifying criminalist] created to form his opinion regarding the DNA match." *Id.* at *13-15. The court found that this surrogate testimony did not constitute a Sixth Amendment violation for three reasons. First, the court cited *People* v. *Geier*, 161 P.3d 104 (Cal. 2007), for the proposition that an analyst's report "noting

carefully each step of the DNA analysis,. . . [does] not 'bear witness' against [the] defendant." *Id.* at 140. Second, the court opined that the non-testifying criminalist's report was accurate, since it had been subject to peer review. *Id.* at 138-39. Third, the court indicated that the testifying criminalist, who concluded that a DNA match existed, was subject to cross-examination. *Id.*

3. *Schwarz* and *Gutierrez* cannot be reconciled. While the former holds that the analyst who prepared and actually examined the forensic evidence must testify, the latter requires only that a supervisor familiar with the analyst's reports and methods do so. As a result, these cases—decided on the same day by appellate courts within the same state—illustrate the widespread and growing confusion among the lower courts with regard to surrogate forensic testimony.

The California Supreme Court has granted review in several recent Confrontation Clause cases.[6] Regardless of how that court ultimately resolves the surrogate testimony question, its decision will add to the existing nine-to-four split among state high courts and federal courts of appeals. See Pet. for Cert. 19.[7] If the California Supreme Court follows *Gutierrez*, its decision would also conflict with the Ninth Circuit's resolution of the Confrontation Clause

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[6] *See People* v. *Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-12 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People* v. *Gutierrez*, 99 Cal. Rptr. 3d 369 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People* v. *Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People* v. *Lopez*, 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).

[7] At the time the Petition was filed, the split stood at eight-to-four. Pet. for Cert. 19. The Fifth Circuit's recent decision in *Martinez-Rios*, described above, brings the total to nine-to-four.

question in *Norwood*. Compare *Gutierrez*, 2010 Cal. App. Unpub. LEXIS 425, *14-15, *with United States* v. *Norwood*, No. 08-30050, 2010 U.S. App. LEXIS 3042, at *7-8 (9th Cir. Feb. 17, 2010). More generally, the sharp contrast between *Schwarz* and *Gutierrez* is illustrates both the fast-developing and divergent views of the Sixth Amendment requirements in this area and the broader and irreconcilable spilt that cannot be resolved other than through this Court's review. The Fifth Circuit's decision in *Martinez-Rios*, for example, underscores this point on the broader scale, as lower courts need guidance in cases involving non-forensic forms of surrogate testimony as well.

Amicus and its members regularly encounter the question posed by *Pendergrass* in criminal trials and strongly believe that the criminal justice system would benefit from resolution of that question. As the cases surveyed above demonstrate, the split of authorities regarding the admissibility of surrogate testimony is deep and shows no signs of resolving itself in the near future. Indeed, the split itself is entrenched and growing with time. As a result, only prompt review by this Court can provide the guidance necessary to resolve the Confrontation Clause question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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